No. 626

In the Supreme Court of the United States

OCTOBER TERM, 1946

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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Annual Report of the Office of Alien Property Custodian for the Fiscal Year ending June 4, 1944, pp. 12, 131-132 19
Bancroft Davis, *Notes upon Treaties of the United States of America and other powers* (1873) 159 59
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2 Calvo, *Le Droit International* (5th ed. 1896), Sec. 526 ... 34

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1 Curtis, *Constitutional History of the United States* (1889) 188-490 ... 41

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2 *Diplomatic Correspondence of the United States, 1783–1789* (1833), 111, 116–117, 269, 274 ... 44, 45

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2 *Foreign Relations of the United States*, 1923, p. 24, 25, 28 ... 37

6 *Fuzier-Herman, Répertoire Générale Alphabétique du Droit Francaise* (1890) 358, Aubaine 6 ... 35

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Joint Hearings before a Subcommittee of the House Committee on Ways and Means and a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 10820, 69th Cong., 1st Sess., pp. 153–154 22

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2 *Kent's Commentaries*, Sec. 62 34

Lenoir, *The Effect of War on Bilateral Treaties, with Special Reference to Reciprocal Inheritance Treaty Provisions* (1946) 34 Geo. L. J. 129 ..... 12, 26

Letter, Leopold Bierwith, Consul-General of Wurttemberg, to Secretary of State Seward, January 14, 1868, 11 Foreign Consuls in the U. S., MSS., Nat. Archives 57

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Letter from Department of State, dated March 21, 1923, set out in *Goos* v. *Brocks*, 117 Neb. 750, 755–756 26

Letter, Secretary of State Hughes to Dr. Otto Wiedfeldt, the German Ambassador, July 25, 1923, Dept. State File No. 711.622/21a, MSS., Nat. Archives 37

Letter, Secretary of State Hughes to Alanson B. Houghton, American Minister at Berlin, August 23, 1923, Dept. State File No. 711.622/22a, MSS., Nat. Archives 37

Letter, Secretary of State Hughes to Senator Lodge, January 17, 1924, Dept. State File No. 711.622/36, MSS., Nat. Archives 33

Letter, Secretary of State Kellogg to Congressman Rainey, October 23, 1926, *Hearings before the House Committee on Ways and Means on Proposed Legislation for the Return of Alien Property*, 69th Cong., 1st Sess., p. 623 26

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4 Moore, *Digest of International Law* (1906) 6 63

116 Papers of the Continental Congress, MSS., Library of Congress:

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Report & Opinions of the Attorney General of Oregon, 1936–1938, p. 375 72

Report & Opinions of the Attorney General of Oregon, 1938–1940, pp. 22, 32, 93, 136, 173, 313 ..... 73, 74

Treaties of Peace with Italy, Bulgaria, Hungary, Roumania and Finland, State Dept. Pub. No. 2743 ..... 20, 26

Treaties in Force, A List of Treaties and Other International Acts in Force on December 31, 1941, State Dept. Pub. No. 2103 (1944) 94

2 Vattel, *Le Droit des Gens*, Sec. 112, Classics of International Law, Fenwick trans., p. 147 34

Wheaton, *International Law* (8th ed.), Sec. 82 34

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v.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 15–21) is reported in 52 F. Supp. 850. The opinion of the Circuit Court of Appeals (R. 29–40) is reported in 156 F. 2d 653.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 22, 1946 (R. 41). A petition for amendment of the opinion was denied by an order entered on July 17, 1946 (R. 41). On August 1, 1946, Mr. Chief Justice Vinson extended

the time for filing a petition for a writ of certiorari until October 21, 1946. The petition for the writ was filed on October 18, 1946, and was granted on December 9, 1946 (R. 42). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Article IV of the Treaty of 1923 with Germany was abrogated by the declaration of war with Germany, or otherwise was rendered inoperative, from that time, by the provisions of the Trading with the Enemy Act, as amended.

2. Whether, despite the contrary provisions of Section 259 of the California Probate Code, the real and personal estate of the decedent passed to her German heirs under Article IV of the Treaty.

3. Whether, apart from its conflict with Article IV of the Treaty, Section 259 of the California Probate Code is invalid as an invasion of the Federal field of control over foreign affairs.

4. Whether Section 259 of the California Probate Code, if valid and applicable here, imposes the burden of proof of the nonexistence of reciprocal inheritance rights upon the respondents, who are invoking the Section to establish interests in an estate or upon the Custodian.

TREATY AND STATUTES INVOLVED

The pertinent portions of the Treaty and statutes involved are set out in Appendix A, pp. 82–84.

STATEMENT

Alvina Wagner, a resident of California, died on June 6, 1942 (R. 1, 4). Her will, dated December 23, 1941, was admitted to probate on June 26, 1942, in the Superior Court of the City and County of San Francisco (R. 1, 3, 4). By this will, she bequeathed her entire estate, composed of real and personal property in San Francisco (R. 11–12), to four heirs-at-law, all residents and nationals of Germany (R. 1, 3, 4, 6). On December 30, 1942, six other heirs-at-law, residents of California, filed in the probate proceedings a petition for determination of heirship (R. 1, 4–5), claiming that under Chapter 895 of California Statutes, 1941, the German legatees were ineligible as beneficiaries and that the California heirs should therefore inherit.

Chapter 895 added to the California Probate Code a new Section 259 which conditioned the rights of aliens not residing in the United States to inherit property in California upon (1) the existence of reciprocal inheritance rights in American citizens in the country of which the alien is a resident, and upon (2) the rights of American citizens to receive payment within the United States of moneys originating from estates of persons dying in such foreign country. Section 259.1, also enacted in Chapter 895, placed upon the nonresident alien heirs the burden of establishing the existence of such reciprocal rights. The condition with respect to receipt

of moneys in the United States was repealed by an amendatory statute, effective in 1945 while this case was pending (*infra*, p. 83). The amendatory statute also shifted the burden of proof, requiring the California claimants to prove the nonexistence of reciprocal inheritance rights.

There has never been a hearing on the petition for the determination of heirship filed in the probate court by the California heirs-at-law. On January 23, 1943, the Alien Property Custodian issued Vesting Order No. 762, by which he vested in himself all right, title, and interest of the German nationals in the estate of Alvina Wagner, and specifically in the real property included in the estate (R. 5–8, 11–12). The Custodian[1] thereafter instituted this action in the District Court of the United States for the Northern District of California against the executor and the six California heirs-at-law (R. 1–3). He sought a judgment determining, *inter alia*, that the California heirs have no interest in the estate and that the Custodian is entitled to the entire net estate after payment of expenses

[1] The Attorney General has succeeded to the functions of the Alien Property Custodian by virtue of Executive Order No. 9788 of October 14, 1946 (11 F. R. 11981). By order of this Court, the Attorney General was substituted for the Custodian as a party. Journal, Jan. 6, 1947. In this brief, we shall, however, refer to the petitioner, as well as his predecessor, as "the Custodian" throughout.

of administration, taxes, and debts, if any (R. 2).

The District Court granted the Custodian judgment on the pleadings (R. 14, 15), holding that it had jurisdiction to enforce the vesting orders of the Alien Property Custodian (R. 18), and that the California statute is invalid as an invasion of "the field of foreign relations, a domain reserved exclusively to the Federal government" and as an interference with the field of control of enemy property, fully occupied by the Trading with the Enemy Act, as amended (R. 20, 22). The court therefore decreed (R. 21–22) that the devises and legacies to the German nationals are valid, that upon the death of the testatrix her estate passed to the German nationals, subject to administration, and that by virtue of the vesting order the Custodian acquired all the right, title, and interest of the German heirs in the estate.

The California heirs appealed to the Circuit Court of Appeals for the Ninth Circuit which, without passing upon the merits of the Custodian's claim, reversed the judgment upon the ground that the District Court was without jurisdiction of the subject matter of the action. *Allen* v. *Markham*, 147 F. 2d 136. On a writ of certiorari, this Court reversed the judgment and remanded the case for disposition on the merits (R. 27–28). *Markham* v. *Allen*, 326 U. S. 490. Thereafter, the Circuit Court of Appeals again

reversed the judgment of the District Court, holding that the California statute is constitutional as an exercise of the power of the State to regulate the succession to property (R. 34–35); that because the provisions of Article IV of the Treaty of 1923 with Germany are irreconcilable with the Trading with the Enemy Act, the treaty provision became inoperative at the time of the declaration of the war, and that such was the intention of the parties to the treaty (R. 36–39). The Circuit Court of Appeals also held that the California reciprocal inheritance statute, as it was amended while the case was last pending before this Court, imposes the burden of proof of the existence of reciprocal inheritance rights upon the Custodian (R. 39–40).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the provisions of the Trading with the Enemy Act, as amended, are irreconcilable with Article IV of the Treaty of 1923 with Germany and that, therefore, the Article became inoperative on December 8, 1941.

2. In holding that the parties to the Treaty of 1923 intended that Article IV should not survive a war between them.

3. In holding that the Congress abrogated or suspended Article IV by enacting the First War Powers Act, 1941, amending Section 5 (b) of the Trading with the Enemy Act.

4. In holding that Section 259 of the California Probate Code, as amended, is not invalid as an invasion of the Federal field of control over foreign affairs.

5. In holding that under the 1945 amendment to the California statute, the burden of proof of the nonexistence of reciprocal inheritance rights is upon the Alien Property Custodian in this case.

6. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

The ultimate question in this case is what the Alien Property Custodian acquired when he vested all right, title, and interest of the German nationals who were named in the will of Alvina Wagner as the beneficiaries of her estate. Since there is no dispute over the validity of the vesting order or the interpretation of the will, it is clear that the only impediment to the Custodian's acquiring the entire estate is the California statute, which purports to condition the right of aliens to inherit property in California upon the existence of reciprocal rights for American citizens in the country of the alien's residence. Our position is that the California statute is invalid, first, because as applied here it conflicts with the Treaty of 1923 with Germany, which has continued in force to date, and, independently, because it is an invasion of the field of foreign affairs exclusively reserved to the Federal Government.

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I

Article IV of the Treaty of 1923 between the United States and Germany provides, among other things, that nationals of Germany shall have the right to succeed by inheritance to property located within the United States. Since this treaty provision is presently effective as part of the supreme law of the land, the California statute, which would here operate as a condition upon the rights of the German nationals involved, must give way.

A

Article IV, we maintain, is presently in force, unaffected by the declaration of war on Germany or by the provisions of the Trading with the Enemy Act. There being no evidence of an intention that the treaty be abrogated in the event of war between the parties, we are remitted to the rule established by this Court—that war abrogates only those treaty provisions whose continued existence is incompatible with the state of hostilities. The essential feature of Article IV, the succession by German nationals to interests in decedents' estates, is not incompatible with the state of hostilities and could not prejudice our national security. Such danger to us as might arise relates to the possibility that the Germans could realize upon their interests, a possibility which is averted by the Trading with the Enemy Act. That Act itself, however, is neither irreconcilable

with the continued existence of a right of inheritance by German nationals nor does it otherwise abrogate or suspend the treaty provision. While the Act may have the effect of forbidding the entry of Germans into the country, its provisions do not make it impossible for the heir to succeed to ownership. The Custodian is empowered to represent such an enemy heir and, where necessary, to license any acts or transactions forbidden by the statute. Nor is the right to inherit property inconsistent with the existence of a power to vest inheritances; the two are rather complementary since it is only where the right exists that the power to vest the inherited property may be exercised. Moreover, it is neither inevitable that the power to vest will be exercised, nor that, once it is, all benefits of the inheritance will be irretrievably lost to the former German owner. The property will be applied to such claims as exist against the German and it is not impossible that further provisions of advantage to some classes of former owners of vested property will be made.

The court below held that Congress, in amending the Act in 1941 to confer the broad power to vest the property of any foreign national, ignored the treaty provision and thereby abrogated it. The failure of Congress to take notice of a treaty provision, on the contrary, has been held to establish that there was *no* intention to

abrogate. *Cook* v. *United States*, 288 U. S. 102, 120. The court below also relied on the relationships between the United States and Germany in 1923, the time the treaty was signed, as showing an understanding that Article IV would not survive a war between the two countries. We believe that these circumstances, too, point in the other direction.

B

Article IV guarantees the inheritance rights of Germans both with respect to real and personal property. The Article is a common one in the treaties of the United States and has frequently been before the courts. It is now well settled that the language of paragraph one of the Article, relating to real property, guarantees to the foreign heir the right to take real property, with no qualification other than that, where the state law forbids the ownership of real property by aliens, the heir must sell the property within the period specified. Language similar to that of paragraph two, with respect to personal property, has, however, been held by this Court to guarantee the right to inherit personal property only from estates of alien decedents. Assuming what the record does not show, that the decedent was an American citizen, it is submitted that paragraph two should not be limited to cases of alien decedents but should be construed, in this respect, as broadly as paragraph one. In deciding to the contrary, this Court did

not have before it the diplomatic materials, discussed in this brief, which demonstrate that the treaty provision was intended to guarantee rights to inherit both real and personal property, without regard to the citizenship of the decedent.

II

Apart from the effect of the treaty, the California statute is invalid as an invasion of the exclusively Federal field of control over our foreign relations. The exchange of inheritance rights of American citizens abroad for reciprocal rights of aliens in this country is a matter for international negotiation by the Federal Government, and numerous treaties providing for reciprocal inheritance rights have been concluded by the United States. By conditioning the rights of aliens on the existence of reciprocal rights in the country of the aliens' residence, the statute seeks to accomplish the same object as the treaties. A State may not directly legislate or negotiate for the grant by foreign countries of inheritance rights to American citizens and it may not indirectly accomplish that purpose by conditioning its legislation on such a grant.

III

If, despite the arguments summarized above, the California statute is held valid, it should be construed to impose upon the respondent heirs the burden of proof of the nonexistence of inherit-

ance rights of American citizens in Germany. As amended while appellate proceedings in this case were pending, the statute provides that the existence of such rights shall be presumed unless the contrary is shown by any person interested in the estate.

ARGUMENT

I

ARTICLE IV OF THE TREATY OF 1923 WITH GERMANY IS CONTROLLING HERE AND SUSTAINS THE CUSTODIAN'S TITLE TO THE ESTATE INVOLVED

A. ARTICLE IV HAS CONTINUED IN FORCE DURING THE PRESENT WAR

Treaty provisions are no longer regarded as automatically abrogated by the outbreak of war between the signatory powers. In the absence of evidence of the intention of the parties, the test is the compatibility of the continued existence of the treaty clause with the state of hostilities. *Karnuth* v. *United States,* 279 U. S. 231; *Society for the Propagation of the Gospel* v. *New Haven,* 8 Wheat. 464, 494–495; *The Sophie Rickmers,* 45 F. 2d 413 (S. D. N. Y.). See Lenoir, *The Effect of War on Bilateral Treaties, with Special Reference to Reciprocal Inheritance Treaty Provisions* (1946), 34 Geo. L. J. 129.[2]

[2] The reporter of the Harvard Law School Draft Convention on the Law of Treaties (1935) 29 Am. J. Int. L. Supp., Part III, pp. 1185–1186, has commented on the subject as follows:

"It has come more and more to be realized that there is no necessary incompatibility between the existence of a state of war between two or more states and the maintenance in force

The appellate courts to which this problem was presented following the First World War held that treaty provisions substantially indentical to Article IV survived the hostilities between the signatories. The subject is exhaustively dealt with in an opinion by Judge Cardozo for the New York Court of Appeals in *Techt* v. *Hughes,* 229 N. Y. 222, certiorari denied, 254 U. S. 643, with respect to the reciprocal inheritance clause of the Treaty of May 8, 1848, with Austria (Art. II, 9 Stat. 944, 945). And the Nebraska and Kansas courts have followed *Techt* v. *Hughes* in passing upon the continuing effectiveness of a corresponding provision of the Treaty of May 1, 1828, with Prussia (Art. XIV, 8 Stat. 378, 384). *Goos* v. *Brocks,* 117 Neb. 750; *State ex rel. Miner* v. *Reardon,* 120 Kan. 614.

Techt v. *Hughes* concerned the capacity of a resident alien enemy to inherit real property in New York. Under New York law an alien enemy had no such right and the question was, there-

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of their treaties, even though it may be necessary to suspend their execution during the period of hostilities. There is no reason of public policy or national defense why any treaties should be regarded as *ipso facto* annulled or terminated by the outbreak of war between the parties. Likewise it is more and more realized that there may be treaties or particular stipulations of treaties of which no consideration of public policy or belligerent interest requires that they should even be suspended. In this class are such treaties as those which do not require for their execution direct relations between the enemy parties such as would be incompatible with the carrying on of hostilities."

fore, whether the right was granted by the reciprocal inheritance provision in the treaty with Austria.

Judge Cardozo analyzed fully the principles bearing on the abrogation of treaties by war. His conclusion was that "provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected" (229 N. Y., at 241). He went on to discuss what he believed to be the limited role of the courts in the application of this rule (*ibid.*, 242–243):

> The question is not what states *may* do after war has supervened, and this without breach of their duty as members of the society of nations. The question is what courts are to presume that they have done. "Where the department authorized to annul a voidable treaty shall deem it most conducive to the national interest that it should longer continue to be obeyed and observed, no right can be incident to the judiciary to declare it void in a single instance" (Jay, Ch. J., in *Jones* v. *Walker*, 2 Paine 688, 701. Cf. The Legal Nature of Treaties, vol. 10, American Journal of Int. Law [1916], pp. 721, 722). President and senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts (*Fong Yue Ting* v. *U. S.*, 149 U. S. 698). The treaty of peace itself may set up new relations, and terminate earlier compacts either

> tacitly or expressly. The proposed treaties with Germany and Austria give the victorious powers the privilege of choosing the treaties which are to be kept in force or abrogated. But until some one of these things is done, until some one of these events occurs, while war is still flagrant, and the will of the political departments of the government unrevealed, the courts, as I view their function, play a humbler and more cautious part. It is not for them to denounce treaties generally, *en bloc*. Their part it is, as one provision or another is involved in some actual controversy before them, to determine whether, alone, or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended or even abrogated is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act.

Finding nothing incompatible with national policy in permitting a resident alien to have the rights of inheritance granted by the treaty there involved, Judge Cardozo went on to discuss the case of the nonresident enemy. That discussion is peculiarly applicable to the instant case since it was written in 1920 at a stage after the termination of hostilities in the last war approximately

equivalent to the present stage of development of enemy property legislation and the peace treaties (*ibid.*, 244–245):

> The plaintiff is a resident; but even if she were a non-resident, and were within the hostile territory, the policy of the nation would not divest her of the title whether acquired before the war or later. Custody would then be assumed by the alien property custodian. The proceeds of the property, in the event of sale, would be kept within the jurisdiction. Title, however, would be unchanged, in default of the later exercise by Congress of the power of confiscation (40 Stat. ch. 106, pp. 416, 424), now seldom brought into play in the practice of enlightened nations (2 Westlake Int. L. 46, 47; *Brown* v. *U. S.*, 8 Cranch, 110). Since the argument of this appeal, Congress has already directed, in advance of any treaty of peace, that property in the hands of the custodian shall be returned in certain classes of cases to its owners, and in particular where the owner is a woman who at the time of her marriage was a native-born citizen of the United States and prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary (Act of June 5, 1920, amending sec. 9 of the act of Oct. 6, 1917). It follows that even in its application to aliens in hostile territory, the maintenance of this treaty is in harmony with the nation's policy and consistent with the nation's welfare. To the extent that there

> is conflict between the treaty and the statute (40 Stat. ch. 106), we have the same situation that arises whenever there is an implied repeal of one law by another. To the extent that they are in harmony, both are still in force. There is in truth no conflict here except in points of detail. In fundamental principle and purpose, the treaty remains untouched by later legislation.

This persuasive analysis of the question of survival of reciprocal inheritance treaty provisions in time of war should, we urge, be followed by this Court. The essential provision of Article IV of the Treaty of 1923 with Germany, that nationals of either country should have rights of inheritance in the other, could be given effect throughout this war in a manner, to use Judge Cardozo's phrase, entirely "compatible with a state of hostilities". The succession by a German to mere ownership of property in the United States could have offered no possibilities of impeding our military or economic mobilization. In view of other safeguards, a German's acquisition of title could not have resulted in his being able to use the property in any way prejudicial to our national interest. Such a possibility was averted by the existence of the power in the Custodian to regulate use of such property as the national interest may require, or, as has been done in this case, to vest the German's title. Sec. 2, Executive Order No. 9193, July 6, 1942, 7 F. R. 5205; Sec.

5 (b), as amended, *infra*, p. 84. Concluding as we believe we must, that nothing in the prosecution of the war required an eradication *ab initio* of a German's right to succeed by inheritance, we need not consider whether other provisions of the treaty became ineffective because of incompatibility with a state of hostilities.

The court below did not differ with the authorities on the effect of war on treaties generally (R. 36). It held, however, (a) that Article IV became inoperative because its provisions are irreconcilable with the provisions of the Trading with the Enemy Act and the amendments to it enacted in 1941; and (b) that the circumstances existing at the time of the signing of the treaty show that it was intended to be abrogated by a war.

(1) *The Trading with the Enemy Act and the Treaty.*—The first ground indicated for the holding below is that the rights granted by Article IV are irreconcilable with those provisions of the Trading with the Enemy Act and the Executive Orders issued thereunder which have the effect of forbidding the entry into this country of nonresident enemy heirs, their communicating with persons in this country, and their withdrawal of the proceeds of the inheritance (R. 36–37); and with those provisions which authorize the vesting of alien property (R. 39).

None of these provisions is necessarily irreconcilable with the right to inherit granted by Article

IV. Neither entry into this country nor communication with persons in this country (Sections 2, 3, 40 Stat. 412, 50 U. S. C. App. 2, 3), nor withdrawal of the proceeds of an inheritance (Executive Order No. 8389, 5 F. R. 1400, as amended) is indispensable to an enemy heir's succession to ownership. And even if they were, it is provided that such acts and transactions may be licensed. Moreover, the Custodian is expressly empowered to represent such an heir in all legal proceedings incident to succession. Sec. 5, Executive Order No. 9193, July 6, 1942, 7 F. R. 5205. See *Annual Report of the Office of Alien Property Custodian for the Fiscal Year Ending June 4, 1944,* pp. 12, 131–132.

Similarly, the authority to vest alien property (Section 5 (b), as amended by the First War Powers Act, p. 84, *infra*), is not irreconcilable with a German's right to inherit. In fact, it is only on the assumption that, in accordance with Article IV of the treaty, a German becomes the owner of property left to him by a decedent in the United States, that the vesting power could be brought to bear upon his inheritance. Furthermore, since the Custodian's authority to vest is discretionary and not mandatory, there is no inevitability that a German's inheritance will be vested. And where there is vesting by the Custodian, the point of time at which it must take place is further proof that the Act and the treaty are not irreconcilable. The treaty operates to

assure the German's succession to ownership at the time of the decedent's death (in this case, 1942). The vesting order addressed to such an inheritance must necessarily operate later (in this case, 1943), after the treaty has had its effect. Finally, even though vesting terminates all interest of the German in the vested property, it is by no means certain that he will be completely and permanently deprived of all benefits of his inheritance. If the German owes money to American creditors, the property will be applied to the payment of his debts. Section 34, added by Section 305, First War Powers Act, 1941, as amended by Public Law No. 671, 79th Cong., 2d Sess. And it is not impossible that by the peace treaty [3] or legislation [4] further provision of advantage to some classes of former owners of vested property will be made.

The court below nevertheless found in the vesting authority of Section 5 (b) as amended by

[3] In the treaties of peace with Italy and the satellite nations, signed February 10, 1947, each of the Allied and Associated Powers has undertaken to return the residue of the property within its territory and belonging to these ex-enemy nations and their nationals, after the satisfaction of war claims and debts. The ex-enemy nations have undertaken to compensate those of their nationals whose property is not returned. Art. 79, Treaty with Italy, p. 37; Art. 25, Treaty with Bulgaria, p. 12; Art. 29, Treaty with Hungary, p. 16; Art. 27, Treaty with Roumania, p. 13, *Treaties of Peace with Italy, Bulgaria, Hungary, Roumania and Finland*, State Dept. Pub. No. 2743.

[4] With respect to property vested during this war, Congress has recently granted authority which permits the return of

the First War Powers Act (p. 84, *infra*), special confirmation of its view that Article IV must be regarded as abrogated. In the enactment of the First War Powers Act, the court declared, "Congress by ignoring the Treaty effectively provided for breaking or suspending or abrogating the reciprocal inheritance provision" (R. 39). While it is correct to state that Congress took no notice of the reciprocal inheritance provision of the treaty in amending Section 5 (b),[5] the proper conclusion from such silence is rather

property formerly owned by classes of persons not deemed hostile to the United States, including enemy nationals who have been the victims of political, racial or religious discrimination by the enemy. Sec. 32 (a), added by Public Law No. 322, 79th Cong., 2d Sess. and as amended by Sec. 2, Public Law No. 671, 79th Cong., 2d Sess.

[5] We have found no reference to the question of treaty obligations in the legislative history of the First War Powers Act, 1941 (55 Stat. 839), which contains the amendment to Section 5 (b) under discussion.

The legislative history of the Trading with the Enemy Act and its earlier amendments gives no indication that Congress adverted to a possible relationship between the legislation and treaty provisions for reciprocal inheritance rights. In the course of the discussions in the Congress there were many references to Article XXIII of the Treaty of July 11, 1799, with Prussia, 8 Stat. 162, 174 (as revived by Article XII of the Treaty of May 1, 1828, 8 Stat. 378, 384), which provided that in time of war the contracting parties would permit the merchants of the other party to leave the country with their possessions. *E. g.*, Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 4704, 65th Cong., 1st Sess., p. 33; 55 Cong. Rec. 4851, 65th Cong., 1st Sess.; 61 Cong. Rec. 2510, 3283, 3298, 67th Cong., 1st Sess.; Hearings before the House Committee on Inter-

that Congress has thereby *not* shown an intention to abrogate. *Cook* v. *United States*, 288 U. S. 102, [illegible] Section 5 (b) authorizes the vesting of property of "any foreign country or national thereof," not merely of enemies. If this wide grant of authority be held to constitute abrogation of Article IV of the treaty with Germany, the abrogation would logically extend to the comparable clauses in our existing treaties with such friendly countries as Great Britain (Art. I, II, March 2, 1899, 31 Stat. 1939), Norway (Art. IV, June 5, 1928, 47 Stat. 2135, 2138), Brazil (Art. XI, Dec. 12, 1828, 8 Stat. 390, 392), and Spain (Art. III, July 3, 1902, 33 Stat. 2105, 2107). See Appendix C, pp. 93–94, 94 n. 1. An intention to abrogate all these treaty clauses cannot be attributed to Congress merely because of the failure of Congress to consider the instant treaty at the time of the amendment of Section 5 (b). To the contrary, it is established that a treaty will not be deemed to have been abrogated by a later statute unless an intention to abrogate has been clearly

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state and Foreign Commerce on H. R. 13496, 67th Cong., 4th Sess., pp. 40, 155, 181, 227; 69 Cong. Rec. 882, 70th Cong., 1st Sess.; Joint Hearings before a Subcommittee of the House Committee on Ways and Means and a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 10820, 69th Cong., 1st Sess., pp. 153–154. We have found no mention, however, of the possible effect of the Act on Article XIV of the treaty of 1828, the clause which provides for reciprocal inheritance rights (8 Stat. 378, 384).

manifested. *Cook* v. *United States,* 288 U. S. 102, 120; *Chew Heong* v. *United States,* 112 U. S. 536.

We believe that neither the general prohibition in the Trading with the Enemy Act against transactions by and with enemies nor the broad authority to vest any property of a "foreign country or national thereof" can properly be regarded as irreconcilable with the continuing validity of Article IV of the treaty with Germany. But even if clear conflict with the Germans' right to inherit resulted from the administration of the Act, we suggest that abrogation of the treaty would not be the result. The Act was not addressed specifically to the problem of inheritance by enemies. If that problem is affected, it is only because of the comprehensiveness of provisions addressed generally to trading with the enemy and vesting of alien property. The impact of the Trading with the Enemy Act upon the reciprocal inheritance provisions of Article IV is incidental, subsidiary, and fortuitous.

Abrogation of a treaty is hardly a matter to be concluded as an unintended consequence of a general legislative program. At most, the claimed inconsistency between the Act and the treaty would ordinarily give rise to a diplomatic complaint that the executive branch of the Government, under broad authority conferred by the legislative branch, has acted in violation of the

treaty. If such an unintended breach of the treaty obligation has been committed, the consequences are political questions which only the executive and legislative branches can resolve[6] (*Head Money Cases,* 112 U. S. 580, 599; see also *George E. Warren Corp.* v. *United States,* 94 F. 2d 597 (C. C. A. 2)), but there has not been the equivalent of abrogation (*cf. Charlton* v. *Kelly,* 229 U. S. 447). Until the will of the political departments of the Government is unambiguously expressed to the contrary, the treaty remains, as the Constitution requires, the supreme law of the land.

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[6] Respondents' brief in opposition to certiorari (p. 8) apparently suggests that on the collapse of the German Government in 1945, the German state became incapable of performing its treaty obligations. The existence of Allied control in Germany, however, insures that Germany can comply with the obligations of the treaty. The Allied Control Council has assumed the control of Germany's foreign affairs and treaty obligations, and has directed that property in Germany belonging to nationals of the United Nations be reported and safeguarded until, on the direction of the Council, it is handed over. Agreement between Governments of the United Kingdom, the United States of America, the U. S. S. R., and the Provisional Government of the French Republic, Berlin, September 20, 1945, Sec. III, paragraphs 5, 6; Sec. VI, paragraphs 19 (b), 19 (c), *The Axis in Defeat,* State Dept. Pub. No. 2423, pp. 71, 72, 77. In any event, since the power of a state to perform its treaty obligations is a political question (*Terlinden* v. *Ames,* 184 U. S. 270, 288), the incapacity of Germany to perform the treaty obligations cannot affect the continued validity of the treaty as the law of the land, in the absence of abrogation by the political departments of this Government.

In confirmation of this conclusion, it may be noted that the State Department has expressed the opinion that Article IV has continued to be in effect, an opinion entitled to great weight. *Sullivan* v. *Kidd*, 254 U. S. 433, 442; *Charlton* v. *Kelly*, *supra*. The Department has concluded that "there would seem to be no reason to regard Article IV as not continuing to be operative despite the outbreak of war." (Letter from Acting Secretary of State Grew to Attorney General Biddle, May 21, 1945, Appendix B, pp. 85, 89.)

(2) *The Treaty of Berlin.* The court below also found an intention that the treaty be abrogated or suspended in time of war in the Treaty of Berlin of 1921, restoring friendly relations with Germany (42 Stat. 1939) (R. 38).[7] The Treaty of Berlin ratified the right of the United States, reserved by the Joint Resolution of July

[7] The court suggested that further evidence of such an intention lies in the recognition by the parties that the reciprocal inheritance provision of the treaty of 1828 with Prussia (Art. XIV, 8 Stat. 378, 384), in force at the beginning of the First World War, was abrogated by that war and the Trading with the Enemy Act. This recognition, the court states, is shown by the inclusion of Article XIV in the new treaty of 1923, a "provision which would have been unnecessary if such provisions were still in effect under the older treaty" (R. 38). The court is in error in assuming that the ineffectiveness, in 1923, of the treaty of 1828 can be attributed only to its abrogation by the war. The treaty of 1828 was terminated in 1922 through the failure of the United States to give the notice required by the Treaty of Berlin for its revival. *The Sophie Rickmers*, 45 F. 2d 413 (S. D. N. Y.); *Flensburger Dampfercompagnie* v. *United States*, 59 F. 2d

2, 1921 (42 Stat. 105, 106), to retain seized German property until "suitable provision for the satisfaction" of war claims against the German Government should be made. The court cited this provision, and the decision of this Court, in 1936, that the Joint Resolution vested absolute title to the property affected in the United States (*Cummings* v. *Deutsche Bank*, 300 U. S. 115), to show an understanding, in 1923,

464, 470–471 (Ct. Cl.), certiorari denied, 286 U. S. 564; letter, Secretary of State Kellogg to Congressman Rainey, October 23, 1926, set out in *Hearings before the House Committee on Ways and Means on Proposed Legislation for the Return of Alien Property*, 69th Cong., 1st Sess., p. 623; letter from the Department of State, dated March 21, 1923, set out in *Goos* v. *Brocks*, 117 Neb. 750, 755–56. Such terminations by a failure to revive under treaties of peace are, however, inconclusive as to the effectiveness of the treaty during the war. *The Sophie Rickmers*, *supra*, at p. 418.

For a discussion of the clauses, customarily found in treaties of peace, abrogating prior treaties which are not specifically revived by the parties, see Lenoir, *supra*, p. 12, at pp. 146–150. The treaties recently concluded with Italy and the satellite nations are consistent with the principle that the war did not abrogate the preexisting treaties between the parties. Article 44 of the treaty with Italy, typical of the four treaties, provides (State Dept. Pub. No. 2743):

> 1. Each Allied or Associated Power will notify Italy, within a period of six months from the coming into force of the present Treaty, which of its pre-war bilateral treaties with Italy it desires to keep in force or revive.
>
> * * * * * *
>
> 3. All such treaties not so notified shall be regarded as abrogated.

that enemy property would be confiscated in time of war and that a reciprocal inheritance treaty provision would not survive the outbreak of another war between the parties. It is most unlikely, however, that the parties to the treaty believed that enemy property was to be confiscated in time of war. In March, 1923, only a few months before the treaty was signed, Congress had given indication of favoring the contrary view by passing the Winslow Act, which authorized the return to former German owners of seized property not exceeding $10,000 in value (42 Stat. 1511, 1512, amending Section 9 (b), subdivisions 9, 10, 50 U. S. C. App. 9 (b)). And subsequent legislation providing for further returns of seized property confirms the conclusions that such retention as there was of seized property resulted from the failure of the German Government to make the "suitable provision" for the satisfaction of war claims required by the Joint Resolution of 1921 and the Treaty of Berlin, rather than from our adherence to a principle of "confiscation." Settlement of War Claims Act of 1928, 45 Stat. 254, 270; Joint Resolution No. 53, 48 Stat. 1267. See *Cummings* v. *Deutsche Bank, supra,* at 119.

In any event, the connection between the Joint Resolution and the Treaty of Berlin, on the one hand, and the subject of reciprocal inheritance rights during wartime, on the other, is too remote to warrant the conclusion that the Resolution and the Treaty are evidence of an intention that Article

IV of the 1923 Treaty should not survive a war. The Department of State has advised that, although there does not appear to be any evidence of the actual intention of the parties to the 1923 treaty with respect to the present question, "in view of the then recent decision in *Techt* v. *Hughes, supra,* it would not be unreasonable to suppose that in case any consideration were given to the point, the parties had in mind the decision in that case and were willing that such a provision as Article IV of the Treaty of 1923 should remain in effect in case of the outbreak of war." (Letter from Acting Secretary of State Grew to Attorney General Biddle, May 21, 1945, Appendix B, pp. 85, 92.)

B. UNDER ARTICLE IV, THE GERMAN NATIONALS SUCCEEDED TO THEIR INHERITANCE OF PERSONAL AS WELL AS REAL PROPERTY

Article IV of the treaty not having been abrogated, it supersedes contrary state law (*Ware* v. *Hylton,* 3 Dall. 199, 236–237, 242–243; *Hauenstein* v. *Lynham,* 100 U. S. 483, 488–490).[8] By its terms, Article IV protects rights to inherit personalty as well as realty, and we therefore contend that it assures that the estate of Alvina Wagner, which

[8] The opinion of the court below reflects an understanding that Article IV was offered to satisfy the requirement of proof under the California statute, that reciprocal inheritance rights exist in Germany (R. 34, 35–36, 40). The Custodian does not rely upon Article IV for such a purpose. To the contrary, we take the position that Article IV establishes the invalidity of the California statute, a position which renders questions of proof under the statute irrelevant.

includes both types of property, devolved upon her German beneficiaries. Realty and personalty are treated in separate paragraphs of Article IV, however, and in different language. Certain decisions of this Court, which we shall discuss later, may be cited to support an argument that the paragraph dealing with personalty is subject to a limitation, indisputably absent from the paragraph on realty, which makes it applicable only if the decedent was a citizen of the signatory country other than that in which the property is located. The record does not show Alvina Wagner's citizenship, and since this case arises on the Government's motion for judgment on the pleadings, we shall for purposes of argument proceed on the less favorable assumption, *i. e.*, that she was an American citizen. In our view, this assumption should not lead to the anomalous conclusion that under the treaty the German heirs' succession is assured with respect to one part of the estate and is left unaffected with respect to the other. The analysis which follows demonstrates, we submit, that such a conclusion is at odds with the history and functions of Article IV.

1. *Realty*

The first paragraph of Article IV governs the succession to realty. It provides (44 Stat. 2132, 2135):

> Where, on the death of any person holding real or other immovable property or inter-

> ests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

There can no longer be any doubt that under this paragraph the German heir of "any person" holding real property in the United States may succeed to such real property, although he is required to sell the property within the specified period. The language of what is now paragraph one first appeared in the Treaty of September 10, 1785, of Amity and Commerce with Prussia (8 Stat. 84, 88), and is found in a large number of treaties thereafter concluded by the United States. See Appendix C, p. 93. Many of these treaties have been applied in the settlement of decedents' estates, and the all but uniform conclusion

of the courts [9] has been that this provision permits alien heirs to take the proceeds of an inheritance of real property despite state law purporting either to limit an alien's right to inherit or to impose discriminatory succession taxes on alien heirs. *Hauenstein* v. *Lynham*, 100 U. S. 483 (Art. V, Treaty of Nov. 25, 1850, with Switzerland, 11 Stat. 587, 590) [10]; *Colson* v. *Carlson*, 116 Kan. 593 (Art. I, Treaty of March 2, 1899, with Great Britain, 31 Stat. 1939) [11]; *Techt* v. *Hughes*, 229 N. Y. 222, certiorari denied, 254 U. S. 643 (Art. II, Treaty of May 8, 1848, with Austria, 9 Stat. 944, 945) [12]; *People* v. *Gerke and Clark*, 5 Cal. 381 (Art. XIV, Treaty of May 1, 1828, with Prussia, 8 Stat. 378, 384) [13]; *Goos* v. *Brocks*, 117 Neb. 750 (Art. VII, Treaty of December 20, 1827, with the Hanseatic Republics, 8 Stat. 366, 370) [14]; *Scharpf* v. *Schmidt*, 172 Ill. 225 (Art. II, Treaty

[9] The only decision to the contrary is one by the California District Court of Appeal, now pending in the Supreme Court of California after argument. *Estate of Knutzen*, 70 A. C. A. 856, 161 P. 2d 598. That case, involving Article IV of the treaty of 1923, is substantially identical with the instant one.

[10] *Accord: Lehman* v. *State*, 45 Ind. App. 330.

[11] *Accord: Sullivan* v. *Kidd*, 254 U. S. 433, *passim*; *Bamforth* v. *Ihmsen, Admr.*, 28 Wyo. 282, 307–312; *Dockstader* v. *Kershaw*, 4 Pennewill (Del.) 398; *McKeown* v. *Brown*, 167 Ia. 489; *Pierson* v. *Lawler*, 100 Neb. 783.

[12] *Accord: Fischer* v. *Sklenar*, 101 Neb. 553.

[13] *Accord: State ex rel. Miner* v. *Reardon*, 120 Kan. 614; *Miller* v. *Clausen*, 299 Fed. 723 (C. C. A. 8), appeal dismissed by consent, 269 U. S. 595; *Ripley* v. *Sutherland*, 40 F. 2d 785 (App. D. C.), certiorari denied, 282 U. S. 865; *Doehrel* v. *Hillmer*, 102 Ia. 169; *Wilcke* v. *Wilcke*, 102 Ia. 173; *Goos* v. *Brocks*, 117 Neb. 750.

[14] *Accord: Schultze* v. *Schultze*, 144 Ill. 290.

of April 10, 1844, with Wurttemberg, 8 Stat. 588) [15]; *Ahrens* v. *Ahrens,* 144 Iowa 486 (Art. X, para. 9, Treaty of June 10, 1846, with Hanover, 9 Stat. 857, 865); *Bollermann* v. *Blake,* 24 Hun. 187, affirmed, 94 N. Y. 624 (Art. II, Treaty of March 26, 1844, with Hesse, 9 Stat. 818).[16] "The treaties have always been for the purpose of enabling an alien to take even though the particular State may not have expressly permitted it." *Blythe* v. *Hinckley,* 180 U. S. 333, 341.

2. *Personalty*

The second paragraph of Article IV provides (44 Stat. 2132, 2135):

> Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their

[15] *Accord: Kull* v. *Kull,* 37 Hun 476 (N. Y.); *Wieland* v. *Renner,* 65 How. Pr. 245 (N. Y.).

[16] The nature of the title acquired by the alien heir has been variously described as a fee (*Kull* v. *Kull,* 37 Hun (N. Y.) 476, 478–479), a "base or qualified or a terminable fee" (*Miller* v. *Clausen,* 299 Fed. 723, 727 (C. C. A. 8), appeal dismissed, 269 U. S. 595), and a determinable fee (*Schultze* v. *Schultze,* 144 Ill. 290, 297). The terminology has been recognized to be unimportant. "That the right to sell carried with it the ownership as a necessary incident to the power of sale is held by all the authorities." *Ahrens* v. *Ahrens,* 144 Iowa 486, 489. See *Techt* v. *Hughes,* 229 N. Y. 222, 240, certiorari denied, 254 U. S. 643.

> heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

The first sentence of this paragraph couples two clauses, each of which was intended to fulfill a separate purpose. The first provides for the freedom of disposition of personal property and the second for freedom of receipt of such property by donees and heirs. Although the sentence has appeared in some fifty treaties concluded by the United States (Appendix C, p. 93), it was first written in 1785 [17] with the civil, and not the

[17] Article IV of the instant treaty is based on Article X of the treaty of 1785 with Prussia (8 Stat. 84, 88). Article X appears as Article X of the renewal Treaty of July 11, 1799 (8 Stat. 162, 166) and was again copied as Article XIV of the treaty of May 1, 1828 (8 Stat. 378, 384; see 2 Drafts of Treaties (Germany–1828) 233, MSS., Nat. Archives). At the time of the ratification of the 1923 treaty, Secretary of State Hughes wrote to Senator Lodge, Chairman of the Senate Committee on Foreign Relations, that "Comment regarding Article IV of the new draft is believed to be unnecessary except to call attention to the similarity of this Article to Article XIV of the Treaty with Prussia [of May 1, 1828]".

common law,[18] in mind. The necessity for separate statement of the two clauses lay in the fact that by the *droit d'aubaine* and the *droit de detraction*, the civil law imposed restrictions upon both the alien's right to dispose of his property and his right to inherit property.[19]

Letter dated January 17, 1924, Dept. State File 711.622/36, MSS., Nat Archives.

The citations to fifty-two treaties modeled on the treaty of 1785 with Prussia are collected in Appendix C, p. 93; see also Gibson, *Aliens and the Law*, (1940) App. B, Table 8, pp. 182–183.

[18] The United States gave little in return for the privileges granted to American citizens by the reciprocal inheritance clauses with respect to personalty in our early commercial treaties, since the common law imposed no restrictions on the right of an alien to inherit personal property. 2 *Kent's Commentaries*, Sec. 62; Devlin, *Treaty Power* (1908), Sec. 229. One author has commented that the valuable exemptions in the treaty of 1783 with France from the continental restrictions was obtained by "simply giving a corresponding concession in return therefor, and exempting citizens of France from similar burdens, if any existed, in this country." 1 Butler, *Treaty Making Power in the United States* (1902), Sec. 153.

[19] The *droit d'aubaine* was the right of the sovereign to the property of an alien dying in the realm and the *droit de detraction* was the tax imposed on the right of an alien to inherit the property of a deceased person. *Nielsen* v. *Johnson*, 279 U. S. 47, 55, n. 2, 55–56. See also 4 Miller, *Treaties and Other International Acts of the United States* (1934) 546; Wheaton, *International Law* (8th ed.), Sec. 82; 2 Calvo, *Le Droit International* (5th ed. 1896), Sec. 526; 5 Guyot, *Répertoire de Jurisprudence* (1784) Detraction 567.

The droit d'aubaine included the complementary incapacity of an alien to inherit even from a citizen. *Nielsen* v. *Johnson*, *supra*; 2 Vattel, *Le Droit des Gens*, sec. 112, Classics of International Law, Fenwick trans., p. 147; Demangeat,

With respect to the first clause, dealing with rights of disposition, it is quite clear that the only property comprehended is property belonging to a national of one of the High Contracting Parties located "within the territories of the other." Since nationals have always had the right to dispose of property in their own country, it was only property "within the territories of the other" country which afforded a subject for treatment by international agreement. The purely domestic nature of a national's rights to dispose of property in his own country made it superfluous to treat such property in this clause. The second clause, however, is a different matter. It is addressed to the right of nationals of one country to *succeed* to property located in the other. The *droit de detraction* applied to all such property whether the decedent was a national or an alien. See n. 19, *supra*. Hence, there was no reason to limit the privilege of succession to the property of nationals only. We submit, therefore, that the difference in the functions of the two clauses argues against reading the second clause as limited to the cases encompassed by the first. The second clause can be so limited only by making the word "such," which precedes "personal property" in the second clause, carry an extremely heavy freight of meaning. "Such" must be accepted not merely as importing from the

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Histoire de la Condition Civile des Étrangers en France (1844), p. 107; 6 Fuzier-Herman, *Répertoire Générale Alphabétique du Droit Francaise* (1890) 358, Aubain 6.

first clause the direct reference to "personal property of every kind within the territories of the other"; it must also be accepted as transmitting to the second clause the limitation relevant only to the first, that the property in question be owned by a national of the country other than the one in whose territories the property is located.

In our view it is much more natural as a matter of grammar to read the second clause as a grant of rights of succession independent of the limitation germane to the first. When the references from the first clause are incorporated it becomes clear that the second clause grants inheritance rights without regard to the citizenship of the decedent:

> and the heirs, legatees and donees [of nationals of either High Contracting Party], of whatsoever nationality, whether resident or nonresident, shall succeed to personal property [of every kind within the territories of the other].

Under the clause thus construed, an heir of German nationality may succeed to personal property in the United States, and an heir of American nationality may similarly succeed to such property in Germany, regardless of the citizenship of the decedent.

While there is little evidence of the interpretation placed on this language by the parties in 1923, at the time of the conclusion of the instant

treaty,[20] this reading accords with the mutual interest of the two Governments at that time. From the point of view of the German Government, it was as important to secure the right of their nationals to inherit property in this country from American citizens as it was to secure the right of such nationals, concededly granted by the paragraph, to inherit such property from German citizens. Indeed, in view of the high rate of naturalization of immigrants of German origin,[21] the right of Germans to inherit property in this country from American citizens was by far the more valuable right to the German Government. And the reciprocal right, the right of American

[20] The interpretation advanced in this brief finds support in the translation of the two clauses into German. In the German text, the first and second clauses are separate sentences, the conjunctive "and" being omitted (44 Stat. 2132, 2135). There is, however, no extrinsic evidence relevant to this question. The memorandum of explanation agreed upon by the negotiators prior to the signature of the treaty discusses only the first paragraph of Article IV, which deals with real property and, moreover, states that the memorandum is not to be taken as an interpretation of the treaty. See 2 *Foreign Relations of the United States*, 1923, pp. 24, 25, 28. The first draft of the treaty was prepared by this government and contained Article IV in its final form. Letter, Secretary of State Hughes to the German Ambassador, Dr. Otto Wiedfelt, July 25, 1923, Dept. State File 711.622/21a, MSS., Nat. Archives. Secretary Hughes commented on the second paragraph that it was "self-explanatory." Letter, Secretary Hughes to the American Minister at Berlin, Alanson B. Houghton, August 3, 1923, *ibid.* /22a.

[21] The rate in 1930 was approximately 70%, as compared with approximately 58% for the entire foreign-born white population. See *Fifteenth Census of the United States (1930)*, *Population*, Vol. II, pp. 401–406.

citizens to inherit estates in Germany from German citizens, was also of considerable importance to the United States. The flow of immigration has consistently been into the United States, and, therefore, it has aways been more likely than not that the decedent in an estate in Germany falling to American citizen heirs would be a German citizen. The United States was, therefore, at least equally interested in securing the right of our citizens to inherit estates in Germany from German citizens as it was in their right to inherit such estates from American citizens.

In 1860, this Court, in interpreting the similar Treaty of 1844 with Wurttemberg, adopted a construction contrary to the one we advance here. *Frederickson* v. *Louisiana*, 23 How. 445. Three subsequent decisions of this Court have followed *Frederickson* v. *Louisiana* (*Petersen* v. *Iowa*, 245 U. S. 170; *Skarderud* v. *Tax Commission*, 245 U. S. 633; *Duus* v. *Brown*, 245 U. S. 176[22]), al-

[22] In *Petersen* v. *Iowa*, it was held that Article VII of the Treaty of April 26, 1826, with Denmark (8 Stat. 340, 342) as renewed in 1857 (Art. V, 11 Stat. 719, 720) applied only where the decedent was an alien. That treaty was written in terms of equality of taxation, and the *Petersen* case is of little relevance here. In *Duus* v. *Brown* and *Skarderud* v. *Tax Commission*, companion cases to *Petersen*, a similar decision was made with respect to Art. VI of the Treaty of April 3, 1783, with Sweden (set out *infra*, p. 42, n. 28), as revived in 1816 (Art. XII, 8 Stat. 232, 240) and in 1827 (Art. XVII, 8 Stat. 346, 354). This treaty provision is comparable to the instant treaty. The *Duus* case, however, merely affirmed the decision below on the authority of *Petersen* v. *Iowa*. And *Skarderud* was an affirmance *per curiam* on the authority of *Duus*.

though the decisions of state courts have not.[23]

Since the four cases in this Court involved the validity of discriminatory inheritance taxes on personalty inherited by nonresident aliens, the Court was not directly confronted with the question now raised—whether the realty and personalty provisions of the treaty involved should be similarly construed, without regard to the citizenship of the decedent.[24] In none of these cases, moreover, did the Court have before it the historical material on the treaty clause involved, to which we now turn.

1. *History of the treaty clause prior to Frederickson* v. *Louisiana.*—Together with a large

[23] *Trott* v. *State*, 41 N. D. 614 (Art. II, Treaty of March 2, 1899, with Great Britain, 31 Stat. 1939); *In re Moynihan*, 172 Ia. 571 (Art. II, Treaty of 1899 with Great Britain, *supra*); *Brown* v. *Peterson*, 185 Ia. 314 (Art. XIV, Treaty of June 1, 1910, with Sweden, 37 Stat. 1479, 1488); *Olsson* v. *Savage*, 119 Kan. 603 (Art. XIV, Treaty of June 1, 1910, with Sweden, *supra*); *Schultze* v. *Schultze*, 144 Ill. 290 (Art. VII, Treaty of Dec. 20, 1827, with the Hanseatic Republics, 8 Stat. 366, 370); *Jost* v. *Jost*, 1 *Mackey* (12 D. C.) 487 (Art. V, Treaty of Nov. 25, 1850, with Switzerland, 11 Stat. 587, 590). See also *Re Stixrud*, 58 Wash. 339 (Art. VI, Treaty of April 3, 1783, with Sweden (set out *infra*, p. 42, n. 28).

[24] It is noteworthy that the courts of Iowa and North Dakota, whose judgments were affirmed by this Court in the *Petersen*, *Duus* and *Skarderud* cases, *supra*, later held, when they were presented with modern treaties similar to Article IV of the 1923 treaty, that the language with respect to personalty clause has the same effect as the realty clause. *Trott* v. *State*, *supra*, n. 23; *Brown* v. *Peterson*, *ibid.*; *In re Moynihan*, *ibid.*

number of other treaties, the instant treaty is based on Article X of the treaty of 1785 with Prussia. See n. 17, *supra*. The Prussian treaty, in turn, evolved from the earlier treaties of amity and commerce with France, The Netherlands and Sweden. The diplomatic correspondence for all of these treaties shows that the reciprocal inheritance clause now before the Court has always been understood as providing for inheritance rights without regard to the citizenship of the decedent. In view of the relationship of the instant treaty to these earlier treaties, this evidence may be relied upon here. *Nielsen* v. *Johnson*, 279 U. S. 47, 52; *Factor* v. *Laubenheimer*, 290 U. S. 276, 294–95 *In re Ross*, 140 U. S. 453, 467; *Perkins* v. *Elg*, 307 U. S. 325, 335; *Wildenhus's Case*, 120 U. S. 1.

a. *The treaties with France, The Netherlands and Sweden.* Our first treaty of amity and commerce, that of February 6, 1778, with France, contained a clause directed specifically at the *droit d'aubaine* and the *droit de detraction*. Art. XI, 8 Stat. 12, 18.[25] In our second and third

[25] "The subjects and inhabitants of the said United States, or any one of them, shall not be reputed aubains in France, and consequently shall be exempted from the *droit d'aubaine* or other similar duty under what name soever. They may by testament, donation, or otherwise, dispose of their goods moveable and immoveable in favour of such persons as to them shall seem good, and their heirs, subjects of the said United States, residing whether in France or elsewhere, may succeed them *ab intestat*, without being obliged to obtain letters of natu-

treaties of amity and commerce, with The Netherlands and Sweden, a more general clause, closer in phraseology to the personalty clause of the later treaty with Prussia, provided for the inheritance of both real[26] and personal property, without qualification. Art. VI, Treaty of October

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ralization, and without having the effect of this concession contested or impeded under pretext of any rights or prerogatives of provinces, cities, or private persons; and the said heirs, whether such by particular title, or *ab intestat*, shall be exempt from all duty called droit de detraction or other duty of the same kind, * * * The subjects of the most Christian King shall enjoy on their part in all the dominions of the said States, an entire and perfect reciprocity relative to the stipulations contained in the present article."

[26] These treaties used the words "effects" and "goods," which have been held to include realty. *Todok* v. *Union State Bank*, 281 U. S. 449; *University* v. *Miller*, 14 N. C. 188; *Adams* v. *Akerlund*, 168 Ill. 632; *Contra: Johnson* v. *Olson*, 92 Kan. 819; *Succession of Sala*, 50 La. Ann. 1009. See 2 Miller, *Treaties, etc.* 150.

On the ground, *inter alia*, that the inclusion of real property would encroach on the powers of the States, it was proposed in the Congress to limit the treaty with The Netherlands to personalty. XXII Journals of the Continental Congress (1914) 374, 375–376, 393–396. While the proposal was voted down, the committee of the Congress which recommended ratification of the treaty was pleased that the final form of the treaty used the term "effects" rather than the explicit language "goods, moveable or immoveable". The committee apparently hoped that "effects" would not be taken to include realty. XXIV *ibid.* (1922) 64, 65. See 1 Curtis, *Constitutional History of the United States* (1889) 188–190. A proposal to limit the treaty with Sweden to personalty was also made. The grounds do not appear and the proposal was either voted down or otherwise abandoned. XXIII Journals of the Continental Congress (1914) 622, 623.

8, 1782, with The Netherlands (8 Stat. 32, 36);[27] Art. VI, Treaty of April 3, 1783, with Sweden (8 Stat. 60, 64).[28] The instructions of the Continental Congress to John Adams, appointed to negotiate the treaty with The Netherlands, show that the Congress did not intend that the rights of heirs should be conditioned on the citizenship of their ancestors. The Congress recommended the inclusion of the following Article (XVIII Journals of the Continental Congress (1910) 1205, 1209):

> It shall be lawful and free for merchants and others being subjects either of the said seven United Provinces of the low countries, or any of the said United States of Amer-

[27] "The subjects of the contracting parties may, on one side and on the other, in the respective countries and states dispose of their effects, by testament, donation, or otherwise; and their heirs, subjects of one of the parties, and residing in the country of the other, or elsewhere, shall receive such successions, even ab intestato, whether in person or by their attorney or substitute, even although they shall not have obtained Letters of Naturalization * * *"

[28] "The subjects of the contracting parties in the respective states, may freely dispose of their goods and effects, either by testament, donation or otherwise, in favor of such persons as they think proper; and their heirs in whatever place they shall reside, shall receive the succession *ab intestato*, either in person or by their attorney, without having occasion to take out letters of naturalization. These inheritances, as well as the capitals and effects, which the subjects of the two parties, in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempted from all duty called *droit de detraction* on the part of the government of the two states respectively * * *."

ica, by will, or any other disposition, made either during the time of sickness or at any other time before, or at the point of death, to devise or give away to such person or persons as to them shall seem good, their effects, merchandise, money, debts, or goods, moveable or immoveable, which they have or ought to have at the time of their death, or at any time before, within the countries, islands, cities, towns or dominions belonging to either of the said contracting parties. Moreover, whether they die having made their wills, or intestate, their lawful heirs, executors or administrators residing in the dominions of either of the contracting parties, or coming from any other part, although they be not naturalized, and without having their right contested or impeded under pretext of any rights or prerogatives of provinces, cities or private persons, shall freely and quietly receive and take possession of all the said goods and effects whatsoever, according to the laws of each country respectively * * *

This draft, it is believed, shows an intention to provide both for a right of disposition of property by ancestors and for a right of receipt of inheritances by heirs. There is no suggestion that the latter right is merely incidental to the former or that it is to be dependent on the citizenship of the decedent. While the draft was greatly condensed in the treaty as concluded (n. 27, *supra*), there is no indication of an intention to change its substance.

b. *The Treaty of 1785 with Prussia.*—The distinction between the realty and personalty clauses was first made in the Treaty of September 10, 1785, with Prussia. The first draft of the treaty, proposed by Prussia after some preliminary negotiations between the Prussian representative and John Adams, contained a clause substantially similar to the corresponding clause of the earlier Dutch and Swedish treaties. 2 *Diplomatic Correspondence of the United States, 1783–1789* (1833) 111, 116–117.

Apparently out of lingering doubts as to the scope of the treaty-making power of the Confederation[29] the Continental Congress, however, instructed its Commissioners, Franklin, Jefferson and Adams (XXVI Journals of the Continental Congress (1928), 357, 360–361):

> That no rights be stipulated for aliens to hold real property within these States, this being utterly inadmissible by their several laws and policy; but where on the death of any person holding real estate within the territories of one of the contracting parties, such real estate would by their laws descend on a Subject or Citizen of the other were he not disqualified by alienage, there he shall be allowed a reasonable time to dispose of the same, and withdraw the proceeds without molestation.[30]

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[29] See n. 26, *supra*.

[30] When this instruction was presented to the Prussians, they expressed a preference for their original proposal, on the ground, *inter alia*, that the original had reciprocally ex-

Article X of the Treaty, as drafted by the Commissioners (Letter Book of the Commissioners, 116 Papers of the Continental Congress, pp. 66, 74, MSS., Library of Congress), reproduced the instruction from the Continental Congress as an exception to the clause providing for reciprocal inheritance of "personal goods," which thenceforth was limited to personalty. Article X provided, in substantially the same language as Article IV of the instant treaty of 1923, as follows (8 Stat. 84, 88):

> The citizens or subjects of each party shall have power to dispose of their personal goods within the jurisdiction of the other, by testament, donation or otherwise and their representatives, being subjects or citizens of the other party, shall succeed to their said personal goods; whether

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empted the nationals of the two countries from the *droit de detraction*, presumably without qualification. Letterbook of the Commissioners, 116 Papers of the Continental Congress, p. 166, MSS., Library of Congress.

The American Commissioners explained that the revision was attributable to the policy of the common law (8 *Diplomatic Correspondence of the United States*, 1783–1789 (1833) 269, 274):

"By the laws of the United States, copied in this instance from those of England, aliens are incapable of holding real estate. When an estate of that nature descends to an alien, it passes on by escheat to the State; the policy of the United States does not permit the giving to the subjects of any other power a capacity to hold land within their limits, which was proposed by the project formerly delivered to Mr. Adams. But they are perfectly willing to relieve such persons from all loss on this account, by permitting them to sell the inheritance and withdraw the proceeds without any detraction."

> by testament or *ab intestato,* and may take possession thereof either by themselves or by others acting for them; and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein the said goods are, shall be subject to pay in like cases. * * * And where, on the death of any person holding real estate within the territories of the one party, such real estate would by the laws of the land descend on a citizen or subject of the other, were he not disqualified by alienage, such subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all rights of detraction on the part of the government of the respective states.

It will be noted that the first sentence of this Article, which contains the clauses governing the disposal and inheritance of "personal goods", is based on the corresponding language of the earlier Dutch and Swedish treaties (p. 42, notes 27, 28, *supra*) with the addition, in the clause governing disposal, of the phrase "within the jurisdiction of the other". This phrase appears here for the first time and nothing bearing on its intended significance has been found. Its function seems to have been to define more precisely than did the Dutch and Swedish treaties the case in which *disposition* of property required protection from the *droit d'aubaine, i. e.,* the case of disposition of property located in a

country other than that of the citizenship of the owner. The phrase was unrelated to the problem of the extent to which rights of succession were to be granted, free from the *droit de detraction,* and cannot be said to have restricted such rights. Indeed, the terms of the real property clause, also newly-introduced, affirmatively suggest that the personal goods clause was intended to grant the right to inherit personal property from both alien and citizen decedents.

In the absence of the new clause explicitly dealing with real property, the reference to "personal goods" would have included both real and personal property. See p. 41, n. 26, *supra.* The real property clause was, therefore, a deliberate limitation on the scope of the rights to real property granted in the earlier treaties—a substitution of a right to proceeds for the right to take and hold title to real property. The substituted right clearly applied, however, to inheritance from both citizen and alien. The language explicitly comprehended inheritance from "any person holding real estate." It has never been suggested that this language does not guarantee the right to inherit from citizens [31] and such a suggestion would have been startling to the

[31] The question has never been raised in the many cases construing the realty clause (see pp. 30–32, *supra*) and the opinions frequently do not mention the citizenship of the decedent. In several cases, however, it appears that the decedent was an American citizen. *Colson* v. *Carlson*, 116 Kan. 593; *Goos* v. *Brocks*, 117 Neb. 750; *Opel* v. *Shoup*, 100 Ia. 407; *Techt* v. *Hughes*, 229 N. Y. 222, certiorari denied, 254 U. S. 643; *Dockstader* v. *Kershaw*, 4 Pennewill (Del.) 398.

members of the Congress who, being familiar with the common law incapacity of the alien to own real property, no doubt had in mind only the cases of inheritance from citizen owners. See n. 30, *supra*.[32] The real property clause was, then, a limitation on what would otherwise have been the effect of the "personal goods" clause, a limitation, however, which broadly included both the cases of citizen and alien decedents. The Congress which drafted this limitation must, therefore, have believed that the clause for the inheritance of personal goods had the same effect and applied equally to inheritance from citizen and alien.

c. *The Treaties with the German States, 1840-1850.*—This understanding—that the personalty clause applied to all heirs, whether of citizen or alien decedents—was repeatedly expressed during the period in the nineteenth century in which treaties incorporating Article X were being actively negotiated with a large number of countries. In the eighteen forties, similar treaties were negotiated by Henry Wheaton, then Minister to Prussia, with the German states of Bavaria, Hesse, Wurttemberg, Nassau and Saxony. See 4 Miller, *Treaties and Other International Acts of the United States of America* (1934) 546; Appendix C, p. 93. In these treaties the clauses relating

[32] This incapacity had at that time been modified only by the treaties with France, The Netherlands and Sweden, under which aliens might have become the owners of real property by virtue of inheritance.

to realty and personalty were for the first time set out in separate paragraphs.

In requesting authority to conclude these treaties, Mr. Wheaton described the purpose and desirability of reciprocal inheritance treaties as follows (Despatch, Wheaton to Legaré, June 14, 1843, 3 Despatches, Prussia, No. 226, MSS., Nat. Archives; see 4 Miller, *Treaties, etc., supra,* at 547–548):

> These odious prohibitions & taxes on the acquisition & transfer, by the citizens & subjects of one country of property situated in another, or on the sale of their property by the citizens & subjects of one country emigrating to another, which originated in the barbarous ages of the feudal system, when man was chained to the soil on which he grew, have been almost universally abolished by compact, & the common consent of most civilized nations. Almost every commercial Treaty, concluded by the United States with foreign Powers, contains a stipulation for that purpose. It is a matter of very considerable importance with respect to our intercourse with Germany, & the vast emigration constantly going on from this country to the U. States. In all the German States, where it is not otherwise provided by Treaty, a tax is levied on all property sold, & the proceeds of which are carried out of the country by Emigrants, which amounts, in most instances, to ten *per centum* on the capital thus transferred. That amount would con-

sequently be gained to the U. States by the proposed stipulations; & I cannot perceive that we should lose more than we should gain by the free disposition of property by testament or inheritance, on both sides; as, if there be many cases accruing of persons dying in the U. States, & leaving heirs in Germany, there are also probably as many cases of naturalized Germans, resident in the U. States, who are entitled to inherit the property of their relations deceased in Germany.

Mr. Wheaton speaks of the "odious prohibitions on the *acquisition* & transfer" by citizens of one country of property situated in another and states that almost every commercial treaty concluded by the United States contains a stipulation for abolishing these prohibitions and taxes. This statement, taken with his explanation of what we stood to lose or gain by such treaties, shows that he neither understood the existing treaties to limit the inheritance of personalty nor did he propose to conclude treaties containing such limitations. He made no distinction based on the citizenship of the decedent but rather referred to the "cases accruing of *persons* dying in the United States, & leaving heirs in Germany" as being balanced by the cases of "naturalized Germans, resident in the U. States, who are entitled to inherit the property of their *relations* deceased in Germany." Had the treaties not covered the case of inheritance by Americans from German citizens leaving

personal estates in Germany (and the converse case, now before this Court), the major objective of the treaties would in large measure have not been realized. Mr. Wheaton referred to the "vast" emigration going on from the German states to the United States, and, significantly, in illustrating the case in which a resident of the United States would profit, he mentioned the naturalized German who might inherit from his relations in Germany. If such an heir could inherit personalty only from "relations" in Germany who were American citizens, a class certainly not numerous, we would have profited little under the proposed treaties.

Nor did the Department of State, in responding to Mr. Wheaton, make nice distinctions with regard to the heirs to be benefited. He was instructed to take as his "general guide" the treaties with Prussia, the Hanseatic Republics and Hanover, the pertinent clauses of which are substantially identical with Article IV of the instant treaty of 1923. The object of the treaties was stated to be "the removal of all obstructions * * * to the withdrawal from the one country, by the citizens or subjects of the other, of any property which may have been transferred to them by gift, contract, or will—or which they may have inherited *ab intestato.*" 4 Miller, *Treaties, etc., supra* 546, 548.

d. *Negotiations for the Treaty of 1848 with Austria.*—In Article XI of the Treaty of August

27, 1829, with Austria (8 Stat. 398, 401),[33] the form of the earlier treaties with Sweden and Norway was followed and realty and personalty were treated together, as "personal goods," in a single provision much like the instant paragraph with respect to personalty. In 1847 a revised extension of this treaty was negotiated, with the provisions of the Prussian, Wurttemberg and other German treaties as a model. Treaty of May 8, 1848, 9 Stat. 944; see 5 Miller, *Treaties, etc., supra,* 453, 456, 460.

In the course of the negotiations, both parties commented on Article XI of the earlier treaty in a manner showing that they understood it to provide for inheritance without distinction based on the citizenship of the decedent. The Austrian Government suggested that a proposed exemption, in the new treaty, from the *droit d'aubaine* and the *droit de detraction* not affect the restrictions imposed by local Austrian authorities. Secretary of State Buchanan responded, in a letter dated July 19, 1847, pointing out that Article XI of the existing treaty already

[33] "The citizens or subjects of each party shall have power to dispose of their personal goods, within the jurisdiction of the other, by testament, donation, or otherwise; and their representatives, being citizens or subjects of the other party, shall succeed to their personal goods, whether by testament, or *ab intestato*, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their will, paying such dues, taxes or charges, only, as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases."

abolished these rights, without exception (5 Miller, *Treaties, etc.*, 457):

> The 11th Article of the existing Treaty of the 27th August 1829, provides fully and satisfactorily, throughout all the States of both parties, for the abolition of the droit d'aubaine and all discriminating taxes, so far as personal property is concerned. Although this Article is silent in regard to real estate or landed property [34], yet it is manifest that the same rule of justice ought to be applied to both kinds of property. Besides, the devise or descent of a real estate in Hungary to a citizen of the United States, will probably be an event of rare occurrence.

In compliance with this objection, the Austrian Charge d'Affaires abandoned his government's proposal and drafted an article to make explicit the reciprocal exemption. See 5 Miller, *Treaties, etc., supra,* 458. The draft provided (*ibid.*):

> The stipulation, contained in the XIth Article of the Treaty of Commerce and Navigation of the 27th August 1829,—that the subjects or citizens of both contracting parties shall have power to take possession and dispose, at their will, of any inheritance mutually accruing, paying such dues, taxes or charges only, as the inhabitants of the country, wherein the said goods are, shall be subject to pay in like cases,—shall

[34] Secretary Buchanan apparently believed that the phrase "personal goods" in Article XI did not comprehend real property. See p. 41, n. 26, *supra.*

> be applied to all cases of exportation of property from Austria to the United States of America and vice versa, in whatever way the exportation may take place, in consequence of the emigration of the owner, or of donation, or as marriage portion, or in any other way.

Apparently on Secretary Buchanan's motion, the reason for which does not appear, this Article was not included in the final treaty. See 5 Miller, *Treaties, etc., supra,* 459–460. The Secretary may have regarded it as unnecessary in view of the repetition of the former Article XI as Article I of the new treaty, and the insertion of a new Article II, which deals with realty in the language of the Prussian treaties and the instant treaty. 9 Stat 944. Plainly, however, this exchange of correspondence is a construction of Article XI of the 1829 Treaty as providing for the acquisition by the heir of any inheritance falling due to him without distinction based on the citizenship of the ancestor or donor. Thus both parties deliberately agreed upon a new treaty which they took to mean that the citizens of each should "have power to take possession and dispose, at their will, of any inheritance mutually accruing."

2. *The decision in Frederickson* v. *Louisiana.*— It is clear, then, that in 1860, at the time of the decision of the *Frederickson* case, the treaty provisions under discussion, including specifically the treaty with Wurttemberg, had consistently been understood as unqualifiedly per-

mitting the foreign heir to succeed to his inheritance or the proceeds thereof. This Court, not informed [35] of the history of the treaty provisions, adopted a contrary construction.

The testator in *Frederickson* v. *Louisiana* was a naturalized citizen of the United States, resident in Louisiana, and his legatees were citizens and residents of Wurttemburg. A Louisiana statute imposed a succession tax of 10 per cent on legatees not domiciled in Louisiana and not citizens of other states of the United States. Sec. 7, Act 315, 1855, Acts La., pp. 398, 399. The question was whether Article III of the Treaty of April 10, 1844, with Wurttemberg prevented application of the tax to the alien legatees. Article III provided (8 Stat. 588, 590):

> The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other, by testament, donation, or otherwise, and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies, shall be liable to pay in like cases.

[35] The briefs, which are on file with the Court, contain no reference to the history of the provision.

This Court, affirming the judgment of the Supreme Court of Louisiana, held that the Louisiana statute did not discriminate between citizens of Louisiana and aliens, but rather applied to legatees domiciled abroad without regard to their citizenship. The legatees, were, therefore, regarded as subject only to such duties as were exacted from citizens under the same circumstances. The Court, speaking through Mr. Justice Campbell, went on to state that the treaty was inapplicable to estates of citizens residing at home (23 How. 445, 447–448):

> * * * But we concur with the Supreme Court of Louisiana in the opinion that the treaty does not regulate the testamentary dispositions of citizens or subjects of the contracting Powers, in reference to property within the country of their origin or citizenship. The cause of the treaty was, that the citizens and subjects of each of the contracting Powers were or might be subject to onerous taxes upon property possessed by them within the States of the other, by reason of their alienage, and its purpose was to enable such persons to dispose of their property, paying such duties only as the inhabitants of the country where the property lies pay under like conditions. The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, was not in the contemplation of the contracting powers, and is not em-

> braced in this article of the treaty. This view of the treaty disposes of this cause upon the grounds on which it was determined in the Supreme Court of Louisiana.

It is submitted that the historical material discussed above fully demonstrates the error of this decision and therefore of the cases which followed it (p. 38, *supra*). The error is confirmed by the severe criticism of the case by the Wurttemberg Government and by the position thereafter taken by the Department of State with respect to other treaties, particularly the Treaty of 1899 with Great Britain.

a. *The Wurttemberg Protest.*—The Louisiana tax upheld in the *Frederickson* case closely resembled the *droit de detraction,* one of the civil law taxes which these treaties had intended to abolish reciprocally, and it is small wonder that the Government of Wurttemberg filed a vigorous diplomatic protest against the decision. In a letter dated January 14, 1868, to Secretary of State Seward, the Consul-General of Wurttemberg, Leopold Bierwith, severely criticized the decision as contrary to the plain meaning of the treaty and called attention to the contrary interpretation followed by the Wurttemberg Government (11 Foreign Consuls in the United States, MSS., Nat. Archives):

> It would seem to be obvious that the heirs, legatees, and donees of citizens of the contracting parties are as fully under the provisions of this article as such citizens them-

selves, and that, to avoid doing violence to the terms of the compact, it must necessarily be held to provide that the heirs, legatees, and donees of citizens of each of the contracting parties, if themselves such citizens, shall succeed to the personal property of their ancestors, testators, and donors, paying such duties only as the inhabitants of the country where the property lies, shall be liable to pay in like cases. In other words, it would seem to have been unmistakably agreed that every subject of His Majesty is entitled to be placed on the same footing with an inhabitant of the United States; if he becomes the heir, legatee, or donee of a citizen of either of the contracting parties, in respect of personal property within the United States. And it would follow that a subject of His Majesty, answering to these conditions, is exempt from any tax from which any inhabitant in the United States is exempt in like cases.

The authorities of Wurttemberg, judicial as well as executive and legislative, have invariably adhered to this construction sustained as it is by the context of the treaty, which in its second article [relating to realty] declares that * * *

* * * * *

Under this reading of the treaty, the personal property of Wurttembergers descending to persons belonging to the United States, has always been exempt from the payment of duties of detraction, whether situate in the one country or in the

> other. * * * It (the treaty) was interpreted as having been made rather for the benefit of the living than for that of the dead; rather for the advantage of the heirs, legatees, and donees, than for that of the decedents and donors; and if the former were intended to be relieved from the payment of duties of detraction, it could make no difference to them, whether the foreign country whence their inheritance came, was or was not the native country of the intestate from whom they derived it.

The succeeding Secretary, Hamilton Fish, replied that his Government was bound by the decision of the Supreme Court and suggested, as had his predecessor, that a new treaty be concluded to express the views of the Wurttemberg Government.[36]

A proposed new clause was drafted by the Wurttemberg Government and its substance was agreed to by Mr. Fish,[37] but the inclusion of Wurt-

[36] Letter, Fish to Bierwith, June 7, 1869, 3 Notes to Foreign Consuls in the U. S. 140, MSS., Nat. Archives; Instruction, Seward to Bancroft, Minister to Prussia, Aug. 18, 1868, 15 Instructions to Prussia, No. 75, p. 2, MSS., Nat. Archives. See Bancroft Davis, *Notes upon Treaties of the United States of America and other powers* (1873) 159.

[37] Despatch, Bancroft to Fish, Nov. 29, 1869, 16 Despatches, Prussia, No. 52, MSS., Nat. Archives; Instructions, Fish to Bancroft, Dec. 21, 1869, Jan. 24, 1871, 15 Instructions to Prussia, No. 168, p. 99, No. 193, p. 121, MSS., Nat. Archives. The proposed clause provided (Despatch, Bancroft to Fish, *supra*):

> "The citizens of each of the contracting parties, where an inheritance falls to them ab intestate or by testament or donation in the personal property of a citizen of the other

temberg in the German Empire in 1871 apparently ended the matter.[38]

b. *Constructions by the Department of State—i. The Swiss and Russian Treaties.*—After this Court's decision in the *Frederickson* case, the Department of State took the view we advance in this brief in connection with Article V of the Treaty of November 25, 1850, with Switzerland (11 Stat. 587, 590).[39] That Article is substantially identical with the personalty clauses of both the

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contracting party, shall succeed to the said personal property in all cases without regard to the country in which such testamentary disposition or donation may have been made and in whichever of the two countries the personal property so falling to them by intestacy or by will or donation may lie, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases."

[38] It may also be noted that in 1868 the Louisiana court held that the treaty of 1845 with Bavaria (9 Stat. 826, 827), identical with the Wurttemberg treaty, exempted Bavarian heirs from the tax applied in the *Frederickson* case. *Succession of Crusius*, 19 La. Ann. 369. The opinion neither cites the *Frederickson* case nor does it reveal the citizenship of the decedent. Secretary of State Fish, however, pointed out to the Wurttemberg Government that this decision might mean that the Louisiana authorities would no longer construe the treaty as they had in *Frederickson's* case. Letter, Fish to Bierwith, June 7, 1869, 3 Notes to Foreign Consuls in the U. S. 140, MSS., Nat. Archives.

[39] "The citizens of each one of the contracting parties shall have power to dispose of their personal property within the jurisdiction of the other, by sale, testament, donation or in any other manner; and their heirs, whether by testament or *ab intestato*, or their successor, being citizens of the other party, shall succeed to the said property or inherit it * * *."

Wurttemberg Treaty and the instant treaty of 1923. In 1868, a dispute arose concerning the inheritance by a United States citizen of the personal property of his Swiss maternal grandfather, located in the canton of Aargau. The cantonal authorities had refused to allow the American's claim on the ground that he was not a legitimate heir since his mother, a Swiss citizen, had not married in accordance with Swiss laws. In submitting the dispute to the High Federal Council of Switzerland, the American Minister at Berne argued that the question of the legitimacy of the claimant should be determined by the law of the United States and that, as an American citizen, the claimant "is justly entitled under the treaty to succeed to the property in question, and to take possession thereof by the attorney duly appointed for that purpose." *Diplomatic Correspondence of the United States, 1868,* Part II, 194, 196. The Council held that United States law governed the question of legitimacy but also observed that by virtue of the treaty of 1850 "an American citizen has the right, in case of successions, to be treated as a Swiss." While the major issue was the legitimacy of the American claimant, our minister and the Swiss authorities agreed that, assuming the claimant's legitimacy, the treaty put American citizen heirs on the same footing with Swiss heirs, and that they could therefore inherit from Swiss citizens. *Ibid.*, 197.

When in the next decade the same question arose, this Government again interpreted the treaty provision in this manner.[40] In 1880 it appeared that local Swiss authorities had detained personal property left by a Swiss to a naturalized American citizen of Swiss origin on the ground that since the claimant had not obtained the consent of the canton to his naturalization, his status as an American citizen would not be recognized. In instructing our minister at Berne to press the claim of the American heir, Secretary Evarts said (*Foreign Relations of the United States, 1880,* 952, 953):

> Again, the fifth article [of the 1850 treaty] stipulate in substance that the heirs of a Swiss decedent, being citizens of the United States, whether native or naturalized, shall inherit and dispose of the property of such decedent at their pleasure.

And in 1877 the Secretary took the same position, under the similar treaty with Russia (8 Stat. 444, 448), with respect to the rights of Russian heirs in the United States. In an instruction to our Minister to Russia, he stated that under Article X of our treaty of December 18, 1832, with that country, "Russian subjects may inherit the per-

[40] These constructions of the Swiss treaty were judicially confirmed in 1883 in *Jost* v. *Jost*, 1 Mackey (12 D. C.) 487, in which the Supreme Court of the District of Columbia held that under Article V of the 1850 treaty, Swiss heirs could inherit the personal estate of an American citizen decedent. The other state cases reaching the same result were decided in the present century. See *supra*, p. 39, n. 23.

sonal estate of decedents in the United States and may take possession thereof, by themselves or by others." 4 Moore, *Digest of International Law* (1906) 6.

ii. *The British Treaty of 1899.*—The Louisiana tax statute applied in the *Frederickson* case was repealed in 1877[41] and, as has been shown, for the remainder of the century all the rulings were in support of the right under these treaties of an alien heir to inherit personal property from a citizen decedent. In 1894, however, the Louisiana statute was reenacted[42] and during its four-year life[43] it precipitated the negotiations for what became the Treaty of March 2, 1899, with Great Britain on the subject of reciprocal inheritance rights. 31 Stat. 1939. The negotiations for this treaty show that although the language used was that of the Wurttemberg and Prussian treaties, the treaty was deliberately intended to override the Louisiana statute. The construction placed by the parties on the personalty clause is, therefore, additional evidence that the clause should not be taken to exclude the case of the alien inheriting personal property

[41] Act 86, 1877 La. Acts 125.

[42] Act 130, 1894 La. Acts 165.

[43] The statute was declared unconstitutional in 1898 as in violation of the provision in the Louisiana Constitution requiring that revenue bills originate in the lower House. *Succession of Sala*, 50 La. Ann. 1009. It was not thereafter reenacted.

in this country from an American citizen decedent.

On September 24, 1895, Sir Julian Pauncefote, the British Ambassador in Washington, wrote to Secretary of State Olney as follows (125 Notes from Great Britain, MSS., Nat. Archives):

> A recent enactment of the State Legislature of Louisiana imposing a 10 p/c duty on property inherited by foreigners resident abroad, has drawn the attention of Her Majesty's Government to the present position of British or American subjects, as the case may be, succeeding to property situated in the United States or Great Britain, respectively. There are no existing Treaty arrangements between the two countries for protecting this class of persons from differential legislation directed against them.
>
> * * * * *
>
> I am accordingly to ascertain whether the United States Government would be willing to sign a short convention, declaring:
>
> (1) that no greater charges shall be imposed in the way of succession, probate or administration duties on real or personal property in the United States inherited by British subjects, whether domiciled within the union or not, than are imposed on property inherited by American citizens * * * with provisions securing reciprocal advantage in Great Britain * * * to citizens of the United States.

Although such records of the negotiations as have been preserved disclose no further reference to the Louisiana statute, it is clear that the provisions of the treaty relating to personalty were based on a draft prepared by this Government in response to Sir Julian's letter.[*] Both the draft and the final treaty relate solely to reciprocal inheritance rights and the representation of decedents by consuls of their nationality. Article I provides for the inheritance of real property, in the language of the Prussian and Wurttemberg treaties. Article II, dealing with personal property, also follows the earlier treaties (31 Stat. 1939):

> The citizens or subjects of each of the Contracting Parties shall have full power to

[*] On January 18, 1896, Sir Julian wrote to Secretary Olney referring to the hardships imposed upon British subjects by the laws in force in the United States prohibiting the ownership of real property by aliens. He suggested the conclusion of a treaty granting most-favored-nation privileges with respect to "the tenure, disposition and transmission of real property." 126 Notes from Great Britain, MSS., Nat. Archives. On May 20, 1896, he wrote a third letter, referring to his two earlier letters and requesting the decision of the Government of the United States in regard to the proposals made in the letters. *Ibid.* The first draft of the convention was submitted to the British Ambassador by Secretary of State John Hay on December 9, 1898. 24 Notes to Great Britain 541, MSS., Nat. Archives. Various changes were recommended by the British Foreign Office. Letter, Pauncefote to Hay, 130 Notes from Great Britain, Feb. 16, 1899, MSS., Nat. Archives. These were incorporated. The draft of Article II appeared substantially in what became its final form, the only change being the substitution of the word "territories" for the proposed word "States."

> dispose of their personal property within the territories of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other Contracting Party, whether resident or non-resident, shall succeed to their said personal property, and may take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases.

There is no evidence that the State Department representatives who drafted Article II, or the British representatives who agreed to it, were mindful of the decision in *Frederickson* v. *Louisiana*. Their failure to vary the treaty language explicitly to avert the ruling of that case suggests that they were not. Their adoption of the language of Article II without substantial change from the Wurttemberg form,[15] therefore, demonstrates that they held a view with respect to the treaty language opposite to that expressed in the *Frederickson* opinion.

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[15] The only language in Article II not found in the earlier treaties is the description of the heirs as "whether resident or non-resident." This new phrase merely emphasized the application of the treaty to British citizens wherever resident and could not of itself have been meant to overrule the *Frederickson* decision. If, however, the presence of this phrase is believed to make the *Frederickson* decision inapplicable, that conclusion applies as well to the instant case, since Article IV of the instant treaty with Germany likewise contains such language.

The Louisiana statute which suggested the need for a treaty was understood, according to the British Ambassador's letter, as referring to inheritance by "foreigners resident abroad." That statute had directed his concern to the position of "British or American subjects, as the case may be, succeeding to property situate in the United States or Great Britain, respectively." No existing treaty between the countries, he pointed out, protected "this class of persons from differential legislation directed against them." And in his specific proposal for a clause respecting taxes on succession (broadened in the treaty to apply as well to the privilege of succession), the Ambassador referred to real or personal property in the United States "inherited by British subjects, whether domiciled within the union or not." Plainly, the British Ambassador was making no distinction among the class of British aliens who might succeed to property in the United States. He was seeking a treaty under which property in this country would descend to British citizens without regard to such factors as the citizenship of the decedent. And this Government, having presented a draft treaty to accomplish this purpose, should be held to have acquiesced in the British understanding. *Cf. Hauenstein* v. *Lynham*, 100 U. S. 483, 486–487.

Article IV of the Treaty of 1923 with Germany should be similarly construed.

II

APART FROM ARTICLE IV OF THE TREATY, THE CALIFORNIA STATUTE IS INVALID AS AN INVASION OF THE FEDERAL FIELD OF CONTROL OVER FOREIGN AFFAIRS

Aside from the questions of the effectiveness and construction of the treaty with Germany, the California statute is invalid as an extension of state power into the field of foreign affairs, exclusively reserved to the Federal Government.

As amended in 1945,[46] the statute provides, in part (*infra*, p. 83):

> The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents

[46] It is here assumed that the statute as amended in 1945 is applicable to this case. The original statute was invalid for additional reasons. As enacted in 1941, the statute conditioned the rights of alien heirs not only upon proof of reciprocal inheritance rights of United States citizens in the country of the alien's residence but on the right of United States citizens to receive payment within the United States of moneys originating from estates of persons dying in the country of residence of the alien heir. California Statutes, 1941, Chapter 895. The second condition was clearly invalid as a regulation of foreign commerce. *Cf. Henderson* v. *Mayor of N. Y.*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275; *People* v. *Compagnie Generale Transatlantique*, 107 U. S. 59.

> and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents.

Though ostensibly a regulation of the inheritance rights of aliens, the statute seeks to promote the right of American citizens to inherit abroad by offering to aliens reciprocal rights of inheritance in California. Such an exchange of rights is a matter for settlement by the Federal Government by treaty on a nation-wide basis, and not for separate state action.

This very subject — reciprocal inheritance rights—has been the subject of a large number of treaties concluded by the United States. See Appendix C, p. 93, *infra*. The California statute and similar statutes enacted in a few other states[47]

[47] Arizona, 3 Ariz. Code 1939, Sec. 39–111; Montana, 4 Rev. Code Mont., 1939 Supp., Sec. 10333.2; Nevada, 2 Nev. Comp. Laws Supp. 1931–1941, Sec. 9894; Oklahoma, Okla. Stats. Ann. Perm. Ed., Tit. 60, Sec. 1213; Oregon, 5 Ore. Comp. Laws Ann. (1940), Sec. 61–107; Texas, 1 Vernon's Ann. Rev. Civil Stats. of Texas (1935), Arts. 166, 167 and 177. See also 2 Gen. Stats. of Conn. (1930) Rev., Sec. 5055.

are in substance invitations to foreign countries to trade inheritance rights abroad for inheritance rights in these states. If a foreign country grants American citizens the right to inherit abroad, the California legislature undertakes in return to grant residents of such country the right to inherit in California. The statute has the same objective as the existing reciprocal inheritance rights treaties and must, therefore, be regarded as an indirect attempt to negotiate with foreign countries and as an attempted duplication of the treaty-making program. *Hines* v. *Davidowitz,* 312 U. S. 52. The power of the states severally to negotiate with foreign countries never existed before (*United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 316, 317) and plainly could not exist after the adoption of the Constitution, which unqualifiedly reserved the treaty-making power to the Federal Government and expressly forbade it to the states. *Hauenstein* v. *Lynham,* 100 U. S. 483, 490; 8 Op. A. G. 411, 415–416. While no case has been found involving an attempt by a state, either directly or indirectly, to make foreign arrangements for reciprocal inheritance rights, it was early recognized that such an effort would be beyond the state's power (*People* v. *Gerke and Clark,* 5 Cal. 381, 385) as are all efforts of a state to engage in foreign relations. Cf. *United States* v. *Rauscher,* 119 U. S. 407, 414; *Holmes* v. *Jennison,* 14 Pet. 540, 572; *People ex rel. Barlow*

v. *Curtis,* 50 N. Y. 321, 329. In *Hines* v. *Davidowitz, supra,* at p. 64, this Court, speaking through Mr. Justice Black, commented on the continuous recognition given to the supremacy of the national power in the field of foreign affairs. The national interest, wrote Mr. Justice Black, "imperatively requires that the federal power in the field affecting foreign relations be left entirely free from local interference." *Ibid.,* at p. 63. See also *United States* v. *Belmont,* 301 U. S. 324, 331; *United States* v. *Pink,* 315 U. S. 203, 222–223, concurring opinion of Mr. Justice Frankfurter, at pp. 238–242.

The court below seems to have been of the view that California was not attempting to trade inheritance rights with foreign countries and that the statute was no more than an exercise of the state's undoubted power to regulate the succession to property (R. 35).[48] *Blythe* v. *Hinckley,* 180 U. S. 333, 341–342; *Irving Trust Co.* v. *Day,* 314 U. S. 556, 562.

We may assume, for the purpose of this case, that in the absence of treaty California may properly deny all aliens the right to inherit. *Terrace* v. *Thompson,* 263 U. S. 197, 217. The instant statute is, however, more than a mere denial of inheritance rights to aliens; it conditions the grant or denial on the extension

[48] Two decisions of intermediate courts in California, now pending in the Supreme Court of California after argument, are in accord. *Estate of Alfred Karl Knutzen,* 70 A. C. A. 856, 161 P. 2d 598; *Estate of Bevilacqua,* 70 A. C. A. 679, 917, 161 P. 2d 589.

of similar rights by the country of the alien's residence. The extension of inheritance rights to American citizens by foreign countries is not a proper objective of state legislative action. The right of American citizens to inherit property abroad is a matter for international negotiation by the Federal Government, and a State cannot make it the condition on which it will permit aliens to inherit. *Cf. Henderson* v. *Mayor of N. Y.*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275, 279–280. The protection of the persons of our citizens abroad has been described as "one of the most important and delicate of our international relationships." *Hines* v. *Davidowitz, supra*, at p. 64. The protection of their property rights abroad is of like order of importance and delicacy and no less the exclusive province of the Federal Government.

Moreover, the enforcement of the California statute and the other similar statutes can affect our foreign relations only adversely. These statutes will have little legal significance with respect to those countries with which we have concluded treaties for reciprocal inheritance rights. The guarantee of inheritance rights in such treaties will be recognized as overriding the restrictions which the statutes purport to impose.[40] With re-

[40] The Attorney General of Oregon has so held, with respect to Germany, Italy, Sweden, Norway, Yugoslavia and Spain, in a series of opinions issued under the Oregon statute (*supra*, p. 69, n. 47). *Report and Opinions of the Attorney*

spect to the countries with which we have no such treaty, however, the statutes may well be productive of unfortunate controversies between foreign governments and those who seek to invoke the statutes to the detriment of the foreign heirs. These statutes do not merely deny all aliens the right to inherit, a denial which would perforce be accepted by the foreign governments as a nondiscriminatory expression of the domestic policy of the respective states. The statutes rather pick and choose among classes of aliens, the standard being the reciprocal treatment of American citizens in the home country of the alien. In order to apply the statutes, the state authorities must, therefore, sit in judgment on the treatment of inheritance rights of American citizens by the respective foreign governments.

During this war, the courts of Montana and California have passed on the existence of reciprocal inheritance rights in The Netherlands, Denmark and Greece. The Supreme Court of Montana has held that the testimony of the legal counselor of the Danish Legation that reciprocal rights existed in Denmark was sufficient support for findings of fact favorable to the Danish heirs. *Re Nielsen's Estate*, 165 P. 2d 792. In *Estate of Blak*, 65 C. A. 2d 232, the California District Court of Appeal accepted as conclusive the statement of the Ambassador of The Netherlands

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General of Oregon, 1936–1938, p. 375; *ibid., 1938–1940*, pp. 32, 136, 173.

that reciprocal rights existed in his country. In *Estate of Corcofingas,* 24 Cal. 2d 517, the Greek Consul and the Alien Property Custodian jointly made efforts to show, on behalf of Greek heirs, that reciprocal rights existed in Greece. Their efforts failed for procedural reasons. See record in this Court in *Markham* v. *Kallimanis,* 327 U. S. 788, No. 774, Oct. Term, 1945. And before the outbreak of war, the Attorney General of Oregon passed on the existence of inheritance rights in American citizens in Greece, Russia and Mexico. Relying on information as to the foreign law furnished through diplomatic channels, he held that reciprocal rights existed in Mexico and in Greece, but not in Russia, for the reason that the Russian export currency law would prevent an American heir from receiving payment in the United States of the proceeds of a Russian estate. *Report and Opinions of the Attorney General of Oregon,* 1938–1940, pp. 22, 313, 93.

Foreign governments cannot help being concerned that their laws and customs are thus reviewed by local authorities. Such a review, even where it can be shown that rights of inheritance are extended to American citizens as a matter of course,[50] may provoke resentment. And any decisions adverse to foreign governments

[50] In *Re Nielsen's Estate, supra,* the legal counselor of the Danish Legation testified that while there was no Danish statute or case law expressly permitting United States citizens to take estates in Denmark, that principle is implied in

may, justifiably or not, be regarded as discriminatory. In any event, by imposing upon representatives of foreign governments, to whom the implications of our federal-state judicial system are not always clear, the burden of supporting their nationals in various state courts, the statutes will be a recurrent source of diplomatic friction.

III

IF THE CALIFORNIA STATUTE IS VALID THE COURT BELOW ERRED IN HOLDING THAT THE CUSTODIAN HAS THE BURDEN OF PROOF UNDER IT

In the event that the preceding arguments are rejected and the California statute found valid and effective, it should properly be construed as imposing on the respondent heirs the burden of proof of the nonexistence of reciprocal inheritance rights. As enacted in 1941, Section 259 of the California statute had stated the limitations on inheritance and Section 259.1 had provided, in part, that "The burden shall be upon such nonresident aliens to establish the fact of the existence of the reciprocal rights set forth in

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the disposition of "thousands of estates." He stated (165 P. 2d at p. 794):

"To make myself more clear, I may perhaps add that the idea that residents of the United States should have an inferior position to citizens or residents of Denmark regarding their rights of inheritance in the estates in Denmark, is so alien to the Danish legal mind and the Danish legal system, that one could just as well search for opinions by Danish courts or Danish statutes stating say, that blind or red-haired people have full right of inheritance."

Section 259." Ch. 895, Calif. Stats., 1941. In 1945, Section 259.1 was repealed and Section 259 was amended (Ch. 1160, Calif. Stats. 1945, *infra*, pp. 83–84). As amended, Section 259 provides in part as follows:

> It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution * * * a petition is filed by any person interested in the estate requesting the court to find that * * * such reciprocal rights * * * do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal * * * rights shall be upon the petitioner.

In the concluding words of its opinion (R. 40), the Circuit Court of Appeals apparently held that, despite this amendment to the statute, the Custodian, as plaintiff, must assume the burden of proving reciprocity on the remand of this case. This holding, made without any reference to California law, is contrary to the terms of the statute and to California decision law generally.

In this federal proceeding to determine the interests in the estate, the state rule as to the location of the burden of proof is controlling. *Palmer* v. *Hoffman,* 318 U. S. 109; *Cities Service Co.* v. *Dunlap,* 308 U. S. 208. See *Guaranty Trust Co.* v. *York,* 326 U. S. 99. Particularly

should this be so where, as here, the right sought to be established by the respondent heirs is founded upon a state statute and the statute establishing the right defines the method of proving the facts necessary to support it.

The amended statute clearly creates a presumption that reciprocal rights exist and equally clearly places the burden of establishing the contrary upon the persons who request a finding that such rights do not exist. That burden cannot shift from the respondents to the Custodian merely because the Custodian instituted this suit. The statute does not impose the burden on a person because he is the moving party but rather establishes a presumption generally applicable to succession of property, which can be rebutted only if a "person interested in the estate" requests the probate court to find, and assumes the burden of proving, that reciprocal rights do not in fact exist in the country in question. The Custodian is entitled to rely on the presumption and the respondents are the persons "interested" who must bear the statutory burden if the statute is found to be valid and the case remanded for further proceedings. In holding that the Custodian still has the burden, the court below called for proof of what is explicitly presumed by the statute itself.

The respondents contend (Brief in opposition, p. 11) that the decision of the court below must be read as declaring the amended statute inappli-

cable because enacted subsequently to the decedent's death. The court neither stated that this was its decision nor did it cite or discuss any of the California precedents relevant to the applicability of this type of statute to pending cases. While the question of the applicability of the amendment of Section 259 has not been decided by a California appellate court,[51] an examination of the relevant precedents demonstrates that the holding found by the respondents in the opinion would be erroneous.

Statutes relating to remedy have frequently been held by the California courts to be applicable to existing causes of action even if already in litigation prior to the effective date of the statute. *Sour* v. *Superior Court,* 1 Cal. 2d 542; *Heron* v. *Bray,* 122 C. A. 79. The rule in California, as approved by the Supreme Court of

[51] The Supreme Court of California has under consideration two cases in which the Custodian has urged the applicability of the amendment to Section 259 to cases pending on appeal at the time of the enactment. *Estate of Knutzen,* 70 A. C. A. 856, 161 P. 2d 598; *Estate of Bevilacqua,* 70 A. C. A. 679, 917, 161 P. 2d 589. The amendment, though enacted after the death of the decedent involved, has been held applicable at trial in four cases: *Estate of Natale Achille,* Superior Court, Alameda County, No. 89798; *Estate of Paul Hess,* Superior Court, Los Angeles County, No. 231375; *Estate of Henry Sternberg,* Superior Court, Los Angeles County, No. 232075; *Estate of Emanuel Roth,* Superior Court, Los Angeles County, No. 220049. It has been held inapplicable in *Estate of Giordano,* Superior Court, Fresno County, Dept. 2, No. 19022.

California in *San Bernardino County* v. *Industrial Accident Comm.*, 217 Cal. 618, 629, is:

> When a law only affects the remedy or procedure, all rights of action will be enforceable under the new procedure, without regard to whether they accrued before or after such change in the law and without regard to whether the suit had been instituted or not, unless there is a saving clause as to existing litigation.

The amendment of 1945, shifting the burden of proof, is clearly a law affecting the remedy within the meaning of this rule. The purported substantive right of the respondents to inherit in place of the beneficiaries named by the decedent continued as before. Only the method of establishing the right was changed. The California courts have consistently, although in other contexts, treated the location of burden of proof as a procedural matter. *Tevis* v. *Pitcher*, 10 Cal. 465; *MacArthur* v. *Industrial Acc. Comm.*, 220 Cal. 142. While we have found no California case explicitly holding that a statutory change in the location of the burden of proof is to be applied to pending cases, statutes changing methods of proof have frequently been held applicable to pending cases. *California Employ. Stabilization Comm.* v. *Smileage Co.*, 68 C. A. 2d 249 (*prima facie* effect of report filed with administrative agency); *Arques* v. *National Superior Co.*, 67 C. A. 2d 763 (admissibility of business record to prove cause of

action). See *Vanderbilt* v. *All Persons, etc.*, 163 Cal. 507 (abstract of title made *prima facie* evidence of title). In other states, statutes shifting the burden of proof have uniformly been held to be applicable to cases pending at the time of enactment. *Sackheim* v. *Pigueron*, 215 N. Y. 62; *Southern Indiana R. Co.* v. *Peyton*, 157 Ind. 690; *Wallace* v. *Western N. C. R. Co.*, 104 N. C. 442; *Easterling Lumber Co.* v. *Pierce*, 106 Miss. 672, affirmed, 235 U. S. 380. See *Sampson* v. *Channell*, 110 F. 2d 754 (C. C. A. 1). Only in New Hampshire, which does not follow the California rule that procedural statutes are applied to pending actions, has it been held that a statute shifting the burden of proof is inapplicable to a pending case. *Murphy* v. *Railroad*, 77 N. H. 573.

The conclusion of the court below that the Custodian would have the burden, on remand of this case, of proving the existence of reciprocity may rest, as the respondents contend, on the court's belief that the statute does not apply to cases pending at the time of enactment. If so, the California decisions are to the contrary. In any event, there was error in the court's failure to examine the relevant state law. *Griffin* v. *McCoach*, 313 U. S. 498; *Pecheur Co.* v. *Nat. Candy Co.*, 315 U. S. 666. See *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491, 496; *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 496. If the court has recognized the applicability in this case of the amendment to

Section 259, it has erred in disregarding the plain direction of that amendment, which places the burden of proving non-reciprocity upon the California claimants. In either case, its decision on this point should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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MARCH 1947.

APPENDIX A

Article IV of the Treaty of Friendship, Commerce and Consular Rights with Germany, signed December 8, 1923, proclaimed October 14, 1925, provides as follows, 44 Stat. 2132, 2135:

> Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.
>
> Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality whether resident or non-

resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

Section 259 of the California Probate Code, as amended by Chapter 1160, California Statutes, 1945, effective September 15, 1945, provides as follows:

> The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presump-

> tion shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code.

Section 5 (b) of the Trading with the Enemy Act, as amended by Section 301, Title III, First War Powers Act, 1941, 55 Stat. 839, 50 U. S. C. App., Supp. V, 5 (b), provides in pertinent part as follows:

> (1) During the time of war or during any other period of national emergency declared by the President * * * any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *.

APPENDIX B

Letter from Acting Secretary of State Grew to Attorney General Biddle, dated May 21, 1945:

In reply refer to
Le 740.00113 EW
/4–1245

DEPARTMENT OF STATE,
Washington, May 21, 1945.

MY DEAR MR. ATTORNEY GENERAL: I refer to your letter of April 12, 1945 transmitting a copy of the appellee's brief in the case of *Allen et al.* v. *Markham, Alien Property Custodian,* pending before the United States Circuit Court of Appeals for the Ninth Circuit, in which you state that the Department of Justice is contending that the provisions of Articles I and IV of the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany, signed December 8, 1923, "have not been abrogated by the war, but are still effective". You inquire whether the Department of State concurs in the position which you are advancing on this point.

It appears that the case relates to the inheritance of land in California from a decedent who died June 6, 1942, that the Alien Property Custodian has vested the interests in such land of certain German nationals resident in Germany, and that the Alien Property Custodian and the Department of Justice contend that provisions of Article IV of the Treaty remained in effect despite the outbreak of war and therefore entitled the German heirs to inherit the interest which has been vested by the Alien Property Custodian.

Article I of the Treaty covers a broad field, conferring upon nationals of each High Contracting Party the right to enter and sojourn in the territories of the other, to carry on specified types of occupations, to own or lease buildings and lease land, and to enjoy freedom from discrimination in taxes, freedom of access to the courts, and protection for their persons and property. Article IV relates to the disposition and inheritance of real and personal property.

It appears that the law with respect to the effect of war upon treaties is by no means clear or well settled. As the Supreme Court stated in *Karnuth* v. *United States ex rel. Albro,* 279 U. S. 231, 236 (1929):

"The effect of war upon treaties is a subject in respect of which there are widely divergent opinions * * *. The authorities, as well as the practice of nations, present a great contrariety of views. The law of the subject is still in the making * * *".

Speaking through Judge Cardozo, the New York Court of Appeals said in *Techt* v. *Hughes,* 229 N. Y. 222, 240; 128 N. E. 185, 191 (1920, certiorari denied, 254 U. S. 643):

"The effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law. The older writers sometimes said that treaties ended ipso facto when war came * * *. The writers of our own time reject these sweeping statements * * *. International law today does not preserve treaties or annul them, regardless of the effects produced. It deals with such problems pragmatically,

preserving or annulling as the necessities of war exact. It establishes standards, but it does not fetter itself with rules".

After enumeration of various types of treaty provisions, Judge Cardozo added that the "principle or standard" is "that provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected". Judge Cardozo then pointed out the difference between the effect of war in giving the belligerent government the privilege of terminating the treaty provisions, and termination *ipso facto* by the outbreak of war. He reiterated that the function of the courts was "to determine whether, alone or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended, or even abrogated, is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act" (128 N. E. 185, 192).

In *Karnuth* v. *United States ex rel. Albro, supra,* the Supreme Court appears to have applied a somewhat similar test, in holding that the War of 1812 had terminated the provision of Article III of the Jay Treaty conferring the right "freely to pass and repass" into the territories of the two parties on the American continent. Contrasting this provision with the right to hold lands and dispose thereof accorded under the Treaty of Peace of 1783 and confirmed by Article IX of the Jay Treaty, the court said:

"It is not permanent in its nature. It is wholly promissory and prospective and necessarily ceases to operate in a state of war, since the passing and repassing of citizens or subjects of one sovereignty into the territory of another is inconsistent with a condition of hostility" (279 U. S. 231, 239).

In the *Sophie Rickmers,* 45 F. (2d) 413 (S. D. N. Y. 1930), Circuit Judge Julian Mack held that the outbreak of war in 1917 between the United States and Germany did not terminate or suspend the provision of Article II of the Treaty of Commerce and Navigation of 1828 between the United States and Prussia to the effect that Prussion vessels should be entitled to the same treatment as American vessels in matters of tonnage taxes. He quoted with approval Judge Cardozo's language in *Techt* v. *Hughes, supra,* and added:

"The criteria of judgment must then be pragmatic" (p. 419). Distinguishing the factual situation from that in the *Karnuth* case, *supra,* he said: "Taxation or no taxation cannot vitally affect the course of trade, for the taxes imposed are not so large as to be prohibitory. It is difficult to see how reciprocity of tonnage taxation can in any way affect the national safety, the right of entry itself being in no way denied" (p. 421).

Applying the principles of these decisions to Article I of the Treaty of 1923 with Germany, there would appear to be considerable doubt as to the present effectiveness of some of the provisions of that article, such as those with respect to entry into the United States, the right to engage in certain occupations, et cetera. On the

other hand, there would seem to be no reason to regard Article IV as not continuing to be operative despite the outbreak of war.

A provision in a treaty with Austria-Hungary similar to Article IV was held effective during wartime in *Techt* v. *Hughes, supra,* in which Judge Cardozo laid down the principle quoted and said:

"I find nothing incompatible with the policy of the government, with the safety of the nation, or with the maintenance of the war in the enforcement of this treaty, so as to sustain the plaintiff's title. We do not confiscate the lands or goods of the stranger within our gates. If we permit him to remain, he is free during good behavior to buy property and sell it. * * *

"The plaintiff is a resident; but even if she were a nonresident, and were within the hostile territory, the policy of the nation would not divest her of the title whether acquired before the war or later. Custody would then be assumed by the Alien Property Custodian. The proceeds of the property, in the event of sale, would be kept within the jurisdiction. Title however, would be unchanged, in default of the later exercise by Congress of the power of confiscation (40 Stat. c. 106, pp. 416, 424), now seldom brought into play in the practice of enlightened nations" (128 N. E. 185, 192). Referring to the statements that treaties of commerce were suspended or abrogated by war, he added:

"Commerce is friendly intercourse. Friendly intercourse between nations is impossible in war. Therefore treaties regulating such intercourse are not operative in war. But stipulations do not touch

commerce because they happen to be embodied in a treaty which is styled one to regulate or encourage commerce. We must be on guard against being misled by labels * * *. There is a line of division fundamental in importance, which separates stipulations touching commerce *between* nations from those touching the tenure of land *within* the territories of nations" (*ibid.*, 193).

This case was followed in *State ex rel. Miner* v. *Reardon*, 120 Kans. 614, 245 Pac. 158 (1926), in which the court said with respect to a treaty provision that aliens might inherit:

"if it is to survive a declaration of war it must be upon other grounds; that is, an inference that it is intended to be enforced notwithstanding the parties are at war must be based upon different considerations. Upon the grounds indicated in the opinion in the *Techt-Hughes* case we regard the reciprocal privilege of inheritance as not so related to the carrying on of a war as to create a presumption of an intention it should operate only in time of peace" (p. 159). The Supreme Court of Nebraska came to the same conclusion in *Goos* v. *Brocks*, 117 Neb. 750, 223 N. W. 13 (1929), in which the court said of a treaty provision regarding the disposition and inheritance of property:

"* * * the treaty provision involved in this action may not be disregarded unless required by the necessities of war. The right of alien enemies to inherit cannot affect the fortunes of war existing between the parties to the treaty unless the inheritance may be sold and the proceeds placed in the possession of the enemy during the

progress of hostilities. It is at all times within the power of the government of this country to prohibit the withdrawal of such funds by citizens of a nation with which we are at war" (p. 16).

While the treaty provision in the instant case is somewhat different from that in the *Karnuth* case, it should be noted that in the latter case the Supreme Court said that "there seems to be fairly common agreement that, at least, the following treaty obligations remain in force: * * * provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other" (279 U. S. 231, 236–237).

Although Secretary of State Lansing wrote on September 10, 1918 that the Department did not regard such treaty provisions with respect to the disposition and inheritance of real property as in force during the war with Germany and Austria-Hungary (1918 For. Rel. Supp. 2, p. 309), that statement was made prior to the judicial decisions discussd herein and before the approach represented by those decisions had been so clearly adopted by the courts. There appears to be a trend toward recognizing greater continuing effectiveness of treaty provisions during war than in earlier times. It is believed that Secretary Lansing's statement does not represent the view which would now be held.

It may be observed that the courts of this country appear to have taken a position somewhat more favorable to the continuing effectiveness of treaty provisions in time of war than have many of the writers on international law. Among the modern

writers there appears to be a trend in favor of the view that "the element on which must depend an answer to the question whether or not particular treaty is or is not abrogated by the outbreak of war between the parties, is to be found in the intention of the parties at the time when they concluded the treaty, rather than in the nature of the treaty provision itself." (Sir Cecil Hurst, "The Effect of War on Treaties," 1921–1922 British Year Book of International Law, 37, 47.) See also C. C. Hyde, *International Law* (2nd ed. 1945) volume II, pp. 1546 *et seq.*; Harvard Research in International Law, *Law of Treaties,* 29 A. J. I. L. Supp. (1935), 1183 *et seq.* There does not appear to be any evidence as to the actual intention in this respect at the time when the treaty with Germany was concluded in 1923. However, in view of the then recent decision in *Techt* v. *Hughes, supra,* it would not be unreasonable to suppose that in case any consideration were given to the point, the parties had in mind the decision in that case and were willing that such a provision as Article IV of the Treaty of 1923 should remain in effect in case of the outbreak of war.

In the light of the foregoing the Department perceives no objection to the position which you are advancing to the effect that Article IV of the Treaty of December 8, 1923 with Germany remains in effect despite the outbreak of war.

Sincerely yours,

JOSEPH C. GREW,
Acting Secretary.

The Honorable FRANCIS BIDDLE,
Attorney General.

APPENDIX C

Chronological list of treaties containing a clause similar to paragraph one of Article IV, Treaty of 1923 with Germany, relating to real property. Most of these clauses also contain language similar to paragraph two of Article IV, relating to personal property. Where the personalty clause appears in a separate article, the citation to that article is also given.

Country	Date	Article	Statutes at Large
Prussia	Sept. 10, 1785	X	8: 84, 88.
Spain	Oct. 27, 1795	XI	8: 138, 144.
Prussia	July 11, 1799	X	8: 162, 166.
Colombia	Oct. 3, 1824	IX	8: 306, 308.
Central America	Dec. 5, 1825	XI	8: 322, 326.
Hanseatic Republics	Dec. 20, 1827	VII	8: 366, 370.
Prussia	May 1, 1828	XIV	8: 378, 384.
Brazil [1]	Dec. 12, 1828	XI	8: 390, 392.
Chile	May 16, 1832	IX	8: 434, 435.
Russia	Dec. 18, 1832	X	8: 444, 448.
Venezuela	Jan. 20, 1836	XII	8: 466, 470.
Peru-Bolivian Federation	Nov. 13, 1836	VIII	8: 487, 489.
Sardinia	Nov. 26, 1838	XVIII	8: 512, 520.
Ecuador	June 13, 1839	XII	8: 534, 538.
Hanover	May 20, 1840	VII	8: 552, 556.
Portugal	Aug. 26, 1840	XII	8: 560, 566.
Hesse	Mar. 26, 1844	II and III	9: 818.
Wurttemberg	Apr. 10, 1844	II and III	8: 588.
Bavaria	Jan. 21, 1845	II and III	9: 826, 827.
Saxony	May 14, 1845	II and III	9: 830.
Nassau	May 27, 1846	II and III	9: 849, 850.
Hanover	June 10, 1846	X	9: 857, 865.
Oldenburg [2]	Mar. 10, 1847		9: 868.
Swiss Confederation	May 18, 1847	I and II	9: 902.
Mecklenburg-Schwerin	Dec. 9, 1847	X	9: 910, 918.
Austria	May 8, 1848	I and II	9: 944.
Guatemala	Mar. 3, 1849	XI	10: 873, 877.
Hawaii	Dec. 20, 1849	VIII	9: 977, 979.
Swiss Confederation	Nov. 25, 1850	V	11: 587, 590.
Peru	July 26, 1851	XV	10: 926, 932.
Brunswick and Luneberg	Aug. 21, 1854	I and II	11: 601.
Bolivia	May 13, 1858	XII	12: 1003, 1018.
Venezuela	Aug. 27, 1860	V	12: 1143, 1146.
Dominican Republic	Feb. 8, 1867	V	15: 473, 476.
Nicaragua	June 21, 1867	VIII	15: 549, 553.
El Salvador	Dec. 6, 1870	XXVIII	18 (3): 725, 738.
Orange Free State	Dec. 22, 1871	III	18 (2): 580, 581.
Great Britain [1]	Mar. 2, 1899	I and II	31: 1939.
Guatemala [1]	Aug. 27, 1901	I and II	32: 1944, 1945.
Spain [1]	July 3, 1902	III	33: 2105, 2107.

See footnotes at end of table.

Country	Date	Article	Statutes at Large
Canada [1] [2]	Oct. 21, 1921		42: 2147.
Germany [1]	Dec. 8, 1923	IV	43: 2132, 2135.
Hungary [1]	June 24, 1925	IV	44: 2441, 2443.
Esthonia [1]	Dec. 23, 1925	IV	44: 2879, 2880.
El Salvador [1]	Feb. 22, 1926	IV	46: 2817, 2820.
Honduras [1]	Dec. 7, 1927	IV	45: 2618, 2620.
Latvia [1]	Apr. 20, 1928	IV	45: 2641, 2642.
Norway [1]	June 5, 1928	IV	47: 2135, 2136.
Austria	June 19, 1928	IV	47: 1876, 1879.
Poland [1]	June 15, 1931	IV	48: 1507, 1510.
Danzig [4]	Mar. 9, 1934		48: 1680.
Finland [1]	Feb. 13, 1934	IV	49: 2659, 2662.

[1] In force in December 1941. See *Treaties in Force, a List of Treaties and Other International Acts in Force on Dec. 31, 1941*, State Dept. Pub. No. 2103, 1944, pp. 138, 139, 146, 148, 149, 151, 154, 155, 156, 158, 160, 161, 222, 223, 224, 225. This listing is stated not to be an expression of opinion as to the effect of the war on the treaties in force. *Ibid.*, pp. ii, iii.

[2] Accession to Treaty of June 10, 1846, with Hanover.

[3] Accession to Treaty of Mar. 2, 1899, with Great Britain.

[4] Accession to Treaty of June 15, 1931, with Poland.

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